SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 403

JACK FREDERICK McKART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

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JACK FREDERICK McKART,

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UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

Petitioner, Jack Frederick McKart, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered on June 14, 1968, in the above entitled cause.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit, printed in Appendix attached hereto, *infra*, page 17, is unreported at the present.

JURISDICTION.

The opinion and judgment of the Court of Appeals were filed and entered on June 14, 1968. On July 9, 1968, Petitioner was granted an extension of time within which to petition for certiorari until August 13, 1968. This Petition for Writ of Certiorari will be timely filed on or before August 13, 1968.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED.

(1) Must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A (sole surviving son) exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?

(2) Does a Selective Service registrant lose his IV-A classification as the sole surviving son of a family whose father was killed in World War II, simply because his mother is deceased and he has no sisters?

STATUTES INVOLVED.

50 U.S.C. App. § 456 (o) provides:

> "(o) Except during the period of a war or a national emergency declared by the Congress after the date of the enactment of the 1964 amendment to this subsection [July 7, 1964], where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces of the United States, or subsequently died as a result of injuries received or disease incurred during such service, the sole surviving son of such family shall not be inducted for service under the terms of this title [sections 451-454 and 455-471 of this Appendix] unless he volunteers for induction."

50 U.S.C. App. § 462 (a) provides in material part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by such fine and imprisonment. . . ."

STATEMENT OF THE CASE.

The Petitioner, Jack Frederick McKart, was indicted under a charge of violating the Universal Military Training and Service Act (50 U.S.C. App. § 462), the indictment alleging that he willfully and knowingly failed to comply with an order of his draft board to report for and to submit to induction into the Armed Forces of the United States on April 21, 1966. He pleaded not guilty and was tried without a jury by the court. On May 16, 1967, the Petitioner was found guilty and subsequently sentenced to three years in jail.

The facts of the case are not in dispute. The Petitioner, who was born on February 13, 1943, was classified I-A on February 26, 1963. On May 1, 1964, he was ordered to report for induction on May 11, 1964, but instead wrote to the board stating that as a matter of conscience he could not assist the Selective Service System.

The draft board then sent him forms to be filled out if he sought a conscientious objector classification. It further noted that he might be eligible for a IV-A classification as being the sole surviving son of a family which had its father killed in the Armed Services. In response thereto, the Petitioner refused to make application for a conscientious objector classification but wrote that his "father was killed in the second World War." His draft board cancelled the induction order and classified him IV-A on July 27, 1964, as being a sole surviving son.

In January, 1966, the Petitioner's mother died. The Petitioner was the sole child of that marriage. In February, 1966, the draft board, after consultation with state authorities of the Selective Service System, reclassified the Petitioner I-A. Although he was a sole surviving son, it was Selective Service's position that there was no longer "any family." After he was reclassified I-A, the Petitioner failed to appeal the reclassification and failed to appear for his April 21, 1966, induction.

The trial judge refused to pass on the issue of whether the Petitioner was entitled to a continuance of his IV-A classification, because of the failure of the Petitioner to appeal his classification in February, 1966. The Court felt that Petitioner's conduct meant a waiver of any rights to a IV-A classification and a failure to exhaust his administrative remedies.

The Petitioner was sentenced to three years imprisonment. He appealed. The Court of Appeals for the Sixth Circuit affirmed the trial court (opinion by Phillips, J.) with one judge dissenting (Celebrezze, J.).

The Court of Appeals held that, as the Petitioner had "not appealed his classification through the Selective Service procedures", he could not, in a trial for failure to submit to induction into the Armed Forces, "raise the defense, *upon wholly undisputed facts,* that he was wrongfully classified in violation of the statute." (Appendix, pp. 19-20) (emphasis added).

Judge Celebrezze, in dissent, concluded that "the board's order of induction was not 'pursuant to' the [Selective Service] Act but in contravention of the Act" and that "therefore . . . regardless of how much he [Petitioner] tried, and perhaps even wanted to violate the Act, the Defendant was not guilty of the offense for which he was indicted and tried." Judge Celebrezze also stated:

> "This is not a case where the existence of the exemption depends upon the board's first making a factual determination. Here the board had already determined that the Defendant was entitled to the exemption; the termination of that exemption resulted from the board's erroneous interpretation of the law. I feel, therefore, that application of the doctrine of exhaustion of administrative remedies is inappropriate in this case.
> I would reverse and dismiss the indictment." (Appendix, p. 24) .

REASONS FOR GRANTING THE WRIT.

(1)

The Court of Appeals for the Sixth Circuit has decided in this case an important question of Federal law, which has not been, but should be, settled by this Court, namely: must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A (sole surviving son) exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?

The application of the doctrine of exhaustion of administrative remedies was inappropriate in Petitioner's case because (a) administrative remedies constituted a futile and empty formality; and (b) the issue involved is purely one of law or statutory interpretation.

(a)

There were no questions of credibility or factual dispute to be resolved by an administrative agency in Petitioner's case and the position of the Selective Service System on the significance of his mother's death was well established; namely, that because of it, no family existed of which Petitioner could be the sole surviving son. Thus, he was no longer entitled to his IV-A exemption.

When the sole surviving son amendment was passed by Congress in 1964, Selective Service took the position that no change in the status of the registrant's family would cause a loss of the exemption unless there was the

birth of a full brother (DAA,[1] 15a). This was withdrawn in September, 1964 (DAA, 16a). At Petitioner's trial, the Clerk of the Local Board testified that he was reclassified I-A because "Selective Service headquarters in Columbus" (determined) "that he no longer qualified" (for IV-A), "because the family unit ceased to exist" (DAA, 3a).

The State Headquarters wrote to the National Director on May 10, 1966, requesting advice on the situation. The National Headquarters responded by letter dated June 13, 1966. "Inasmuch as there is no family, it is not believed that he qualified for sole surviving son status." This information was then communicated to Petitioner's local board (DAA, 12a through 14a).

Thus, an appeal to the Selective Service System would have accomplished nothing for the Petitioner. Its position was clear and established.

Where exhaustion of administrative remedies would be a fruitless and empty formality, exhaustion is not required. *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Skinner and Eddy Corp.* v. *U. S.*, 249 U.S. 557 (1919); *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (CA 2d, 1967) and *Glover* v. *U. S.*, 286 F. 2d 84 (CA 8th, 1961). Also see 2 AMERICAN JURISPRUDENCE 2d, p. 441:

> "Where it plainly appears that the administrative remedy would be of no value and fruitless, the party seeking judicial relief does not have to complete administrative procedure before resorting to the courts, particularly where the administrative agency is powerless to afford relief . . . under the rules and

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[1] The symbol, DAA, in this Petition, refers to the Appendix of the Defendant-Appellant filed below.

regulations as promulgated by the head of the department . . ."

(b)

The issue here is solely one of law or statutory construction. The Court of Appeals for the Sixth Circuit concluded that the facts were "wholly undisputed".

The Selective Service System erroneously construed the law in Petitioner's case and upon the erroneous construction reclassified Petitioner I-A and ordered him to report for induction. This course of action was completely outside the jurisdictional power of Selective Service. § 456 (o) of Title 50, App., provides that ". . . the sole surviving son of such family [the father of which was killed in action] *shall not* be inducted . . ." (emphasis added). Yet Petitioner's draft board acted in clear violation of the above statute in reclassifying him I-A and in ordering him to report for induction.

This Court has, in the past, granted judicial relief to those who have been injured by an act of a government official which is in excess of his express or implied powers. *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Stark* v. *Wickard*, 321 U.S. 288 (1944); *American School* v. *McAnnulty*, 187 U.S. 94 (1902).

In *N.L.R.B.* v. *Highland Park Mfg. Co.*, 341 U.S. 322 (1951), this Court refused to allow the question of standing to bar its review of an order which was totally invalid, prohibited by law, and beyond the jurisdiction of the N.L.R.B.

> "It would be strange indeed if the courts were compelled to enforce, without inquiry, an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct.

> The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U.S. at 325 326.

For the same reasons, the courts cannot allow an invalid Selective Service order, based solely on an erroneous interpretation of law, to go unreviewed simply because of a failure to exhaust administrative remedies.

On the same basis, the Courts of Appeals and the District Courts have applied this principle when the doctrine of exhaustion of administrative remedies has been used in an attempt to bar consideration of a pure question of law where there is no factual dispute.

> "The District Court is not an appellate court for reviewing draft board decisions. In cases involving disputed factual findings the scope of review is quite narrow, and if there is any basis in fact for the decision of the Board, a registrant's failure to appeal that decision would prevent his attacking it in the courts. However, there is no factual dispute here. The only question, on the basis of the file and stipulation, is whether the undisputed facts entitle the defendant to a I-O classification. The experience of the administrative boards and agencies will generally render them better equipped than the courts to solve factual problems within their respective fields, but, as stated in *Wills* v. *U. S.*, 384 F. 2d 943, where the dispute is on a question of law, 'the exhaustion rule loses much of its force . . .'" *United States* v. *Carson*, No. J 67 CR 11 (E.D. Ark. Mar. 13, 1968).

In recent cases, the Courts of Appeals have followed this position under similar circumstances. *Wills* v. *United States,* 384 F. 2d 943 (1967); *Wolff* v. *Selective Service Local Board No. 16, supra;* and *Glover* v. *United States, supra.*

The Sixth Circuit Court of Appeals relied upon *Falbo* v. *United States,* 320 U.S. 549 (1944) as interpreted by *Estep* v. *United States,* 327 U.S. 114 (1946) to preclude Petitioner from questioning the validity of his Selective Service order because of failure to exhaust his administrative remedies (Appendix, p. 20). Petitioner maintains that *Falbo* and *Estep* are not relevant in this matter, because they involved factual determinations by local boards within the competency and jurisdiction of those boards. In those cases there was no question that the boards had the authority to resolve the facts in dispute. In the present case there is no dispute of fact and the issue is purely one of law, which the courts are equally as competent, if not more competent, to determine. In fact, it is the duty of the courts to review an erroneous interpretation of Selective Service. With no factual dispute and with a pure issue of law, the doctrine of the exhaustion of administrative remedies as enunciated in *Falbo* and *Estep* simply does not apply.

In particular, the Sixth Circuit Court of Appeals relied upon the assumption that Petitioner might have failed his physical examination at the induction center (Appendix, p. 21). Whether or not this would have occurred is an irrelevant consideration, since Petitioner had already failed to exhaust his administrative remedies by not appealing his reclassification. Even if Petitioner had reported for induction and taken the physical examina-

tion his failure to appeal his reclassification would have constituted a failure to exhaust administrative remedies. Furthermore, to bar the Petitioner from challenging his invalid reclassification and subsequent induction order, solely on the basis of his failure to take a physical examination required as a result of that invalid reclassification, is illogical and unfair.

The question of the application of the doctrine of exhaustion of administrative remedies must be determined by this Court, because of a conflict between the Ninth Circuit and the Sixth Circuit. The Ninth Circuit, in *Wills* v. *United States, supra,* stated that there is little reason to defer to administrative process where a question of law, namely, a claim of constitutional right, is involved and there is no question of fact, 384 F. 2d at 945 (1967). In that case, the Court held that the Defendant was not barred by his failure to exhaust his administrative remedies.

The Sixth Circuit attempted to distinguish *Wills* in its opinion (Appendix, p. 22). However, a comparison of the opinion in each reveals that the Ninth Circuit takes the position that the failure to exhaust administrative remedies is not necessary where a question of law only is presented, while the Sixth Circuit takes the position that a failure to exhaust administrative remedies is fatal regardless of the question involved.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal law and resolve the conflict on this issue prevailing between the Sixth and the Ninth Circuits.

(2)

For the first time, this Court is being asked to determine the question of whether a registrant loses his right to exemption as a sole surviving son when he has no parents or sisters living.

Because of their position that the Petitioner's failure to exhaust his administrative remedies barred any defense in the criminal proceeding, the Courts below did not decide or discuss the question of whether his Local Board's change of classification from IV-A to I-A, upon the death of his mother, was erroneous.

The statute (50 U.S.C. App. § 456 (o)) provides as follows:

> "Where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces . . ., the sole surviving son of such family shall not be inducted for service . . ."

Petitioner maintains that he is entitled to the exemption as a sole surviving son by reason of the death of his father during World War II and that the subsequent death of his mother did not deprive him of the right to that exemption.

Selective Service insists that the right to the exemption ceases when there are no parents or sisters living, because there is no "family" left (DAA, 16a).

This position is not supported by an analysis of the words of the statute or the purpose of the statute.

The statute itself does not recite that the right to this exemption ceases, when no parents or sisters are living. Congress would have recited such a condition if

it intended that there be one. Further, Congress carefully stated the only three conditions which would terminate the right to the exemption, in the statute, namely a declaration of war, a declaration of national emergency, or volunteering for service. Any additional conditions that Congress intended would have been so stated.

When Congress intended to condition an exemption or deferment by requiring the existence of a family relationship, it did so expressly, as in 50 U.S.C. App., § 456 (h), which states that registrants with children and a wife "with whom they maintain a bona fide *family relationship* in *their homes.*" (emphasis added) are entitled to a III-A or hardship deferment. § 456 (o) has no requirement that a family relationship with parents or sisters exist for registrants to be classified as sole survivors.

The interpretation placed upon this statute by Selective Service assumes that the only purpose of this exemption is to spare the surviving son to comfort and support the parents or sisters (DAA, 16a). Petitioner agrees that this is one purpose of the statute, but not the only one. There is the further purpose of leaving a male heir to carry on the name of the family. Also, Congress wanted to spare all members of the family, including the registrant, any more pain and suffering which might be caused by military service. Another purpose of the statute was to relieve a family of any further military duty, because it had borne more than its share of civic responsibility in the defense of the nation by the prior death or deaths. On the basis of these multiple purposes, Petitioner was still entitled to his exemption at the death of his mother.

If the sole purpose of the statute was to have the sole surviving son comfort the surviving parent(s) and sisters,

then the statute ought to require that he live with them. The statute has no such requirement and the Selective Service does not interpret the statute so as to make such a requirement. That, therefore, cannot be the sole purpose.

Selective Service originally agreed with the position of Petitioner in Operations Bulletin No. 263 (DAA, 15a). Later, this Bulletin was rescinded (16a). The legislative history of the statute makes no mention of the necessity of the existence of a family for obtaining the exemption (DAA, 17a-20a). The history shows only that Congress wished to spare the sole surviving son of a father who died as a result of military action. The position is further supported by the statement of Congressman Huber, who introduced the original statute in 1948, 1964 U.S. Code Congressional and Administrative News, Volume 2, page 2540.

On the basis of this analysis and history, Petitioner maintains that this interpretation of the statute is unfounded and that the reclassification of Petitioner to I-A from IV-A was arbitrary and capricious.

No prior decision on this question has come to the attention of Counsel for Petitioner. The United States Armed Forces suffered 292,131 battle deaths during World War II, 33,629 battle deaths during the Korean War and over 25,000 battle deaths to date of the filing of this Petition in Viet Nam. These figures are only indicative of the thousands of males and their families who will be affected by a decision on this question.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal law.

CONCLUSION.

For the reasons severally and collectively assigned here, it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

No. 18194

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK FREDERICK MCKART,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided June 14, 1968.

(Filed June 14, 1968)

Before: PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

PHILLIPS, Circuit Judge. This case arises out of the failure and refusal of Jack Frederick McKart to comply with an order of his local draft board to report for and submit to induction into the Armed Forces of the United States. He was indicted for willfully and knowingly failing and neglecting to perform a duty required of him under the Selective Service Act. 50 U.S.C. App. § 462. He waived a jury trial, was found guilty by the District Judge and was sentenced to a prison term of three years.

McKart's indictment and trial were preceded by a long and somewhat complicated history of dealings with his local draft board. He was born February 13, 1943. Shortly after his eighteenth birthday he completed and filed his Selective Service questionnaire. His local board classified

him I-A and notified him accordingly on February 26, 1963. McKart made no attempt to appeal his classification.

On March 23, 1964, he was ordered to report for a pre-induction physical examination on April 21. He failed to report. On May 1, 1964, the draft board ordered him to report for induction on May 11. Again he failed to report. Instead he wrote a letter stating his refusal to submit to induction and expressing his total antipathy for the Selective Service System. He said that he did not believe in killing; that the Selective Service system violated his beliefs; and that he therefore refused to have anything to do with it. He objected to conscription as slavery, stating: "I refuse to serve this country armed, and I refuse to serve it unarmed by doing alternative service."

The draft board replied by furnishing McKart the special form for conscientious objector and suggesting that he complete the form and return it. The board also stated in its letter that McKart's original questionnaire had indicated that he was the sole surviving son of a family of which one or more members were killed in action or died in the line of duty, and asked for further information. On May 20, 1964, McKart returned the blank form to the board making it clear that he did not wish to become classified as a conscientious objector, saying: "I simply no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he stated:

> "If I indicated that I was a 'Sole Surviving Son' when I filled out your forms around my eighteenth birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the Second World War. I do not have the specific information you asked for."

Although McKart did nothing to claim an exemption as a sole surviving son, the draft board on its own initiative cancelled his induction orders and classified him

IV-A. From July 27, 1964, until February 14, 1966, McKart remained in the IV-A classification.

Early in 1966 the board learned of the death of McKart's mother. His classification was changed from IV-A to I-A. When McKart was informed of this reclassification, he made no effort to appeal. Subsequently he was ordered to report for a physical examination on March 17, 1966, and for induction on April 21, 1966. He failed to comply with either of these orders.

At the trial McKart attempted to defend his refusal to report for induction on the ground that he still is entitled to a IV-A classification as a sole surviving son under 50 U.S.C. App. § 456(o). In a well-reasoned memorandum opinion, District Judge David S. Porter held that the failure of McKart to exhaust his administrative remedies within the Selective Service System barred him from raising the validity of his classification as a defense in the criminal proceeding. Judge Porter said:

> "Of course, he had not exhausted his administrative remedies. He has simply, from the outset, not had anything to do with the Selective Service System.
>
> • • • • •
>
> ". . . The fact of the matter is, however, he did not claim the exemption he now seeks. The draft board gave it to him. He simply rejected the whole idea of the draft. . . ."

On appeal McKart's theory is that a Selective Service registrant is not required to exhaust his administrative remedies when the issue of classification is purely one of law and the position of the Selective Service is so well established that an appeal would be futile.

The issue before us is this: When a Selective Service registrant who has not appealed his classification through the Selective Service procedures is tried for failure to submit to induction into the Armed Forces, may the reg-

istrant raise the defense, upon wholly undisputed facts, that he was wrongfully classified in violation of statute? We answer this question in the negative and affirm the conviction.

In *Falbo* v. *United States;* 320 U.S. 549, the defendant, a conscientious objector, was tried for willful failure to report for assignment to work of national importance. Falbo defended on the ground that he was entitled to a statutory exemption from all forms of national service. The defendant Falbo challenged the order of his local board before he had exhausted his administrative remedies. The Supreme Court held that Falbo could not raise this defense. After the decision in *Falbo,* many courts held that, even after exhaustion of administrative remedies, a registrant could not defend a criminal prosecution on the ground that the board lacked jurisdiction to impose the classification. Indeed, most courts held that judicial review of an erroneous classification could be had only in a habeas corpus proceeding after induction.

In *Estep* v. *United States,* 327 U.S. 114, the Supreme Court held that the defense of an invalid classification may be raised in a criminal prosecution where the registrant has exhausted all administrative remedies, reported for induction, was accepted, but refused to submit to induction. In *Estep* the Court emphasized that the defendant in *Falbo* had not exhausted his administrative remedies:

> "*Falbo* v. *United States, supra,* does not preclude such a defense in the present cases. In the *Falbo* case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." 327 U.S. at 123.

(Appendix)

The requirement that judicial review of a registrant's classification must await both the full exhaustion of administrative remedies and acceptance for induction is founded on the policy of mobilizing national manpower in the shortest practicable period. *Falbo* v. *United States, supra,* 320 U.S. 549, 554. Until the registrant reports and is accepted for induction there is always the possibility that he may be rejected because of his physical condition or perhaps an erroneous classification may be changed. In *United States* v. *Irons,* 369 F. 2d 557, 558-59 (6th Cir.), Judge Mathes said:

> "Not only did appellant spurn all administrative remedies available to him, including appeal, [cf. *Maddox* v. *United States,* 264 F. 2d 243 (6th Cir. 1959)]; he also refused to report for, or submit to a physical examination. Conscientious objectors are not excused from a physical examination. Indeed, no registrant is, and for good reason. [See Selective Service Regs. § 1628.11, 32 C.F.R. §.1628.11 (1965 Supp.).] Even if improperly classified I-A, there remains the possibility, unfortunately all too great in these times, that he will fail the physical examination and be reclassified as 4-F. Where that is the result, all constitutional and other problems incident to I-A classification disappear of course, *eo instanti.* [See: *Falbo* v. *United States,* 320 U.S. 549, 553, 64 S. Ct. 346, 88 L. Ed. 305 (1944); *Moore* v. *United States,* 302 F. 2d 929 (9th Cir. 1962); *United States* v. *Balogh,* 160 F. 2d 999 (2nd Cir. 1947).]
>
> "The same policy requires every registrant to report for induction as ordered, even though he may have valid legal grounds for refusing to submit to induction. [Cf.: *Estep* v. *United States, supra,* 327 U.S. 114, 66 S. Ct. 423; *Williams* v. *United States,* 203 F. 2d, 85, 88 (9th Cir. 1953).]"

Accord, *Moore* v. *United States*, 302 F. 2d 929 (9th Cir.); *Breen* v. *Selective Service Board*, ... F. Supp. ....., 36 U.S.L.W. 2597 (D. Conn.).

In support of the view that administrative remedies need not be exhausted before the validity of a classification is subject to judicial review, appellant relies on the cases of *Wills* v. *United States*, 384 F. 2d 943 (9th Cir.), cert. denied ..... U.S. .....; and *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (2d Cir.).

In *Wills* a registrant was permitted in a criminal proceeding to attack his reclassification without first exhausting his remedies of appeal within the Selective Service System. The local draft board did not mail the registrant his notice of delinquency until long after the expiration of the ten day period for appeal from his subsequent reclassification. The reclassification was found to be not in accordance with the procedure contemplated by the regulations. The Ninth Circuit held that "Knowledge of his delinquency status and impending induction would thus be relevant to appellant's decision whether to appeal, and the board's failure to disclose this fact at the proper time cannot be said to be without consequence to that decision."

In *Wolff* two college students were reclassified from II-S to I-A because they participated at the offices of a Selective Service board in a protest against American involvement in Vietnam. The two students sought to enjoin their local board from reclassifying them. In approving the injunction against the board, the Second Circuit summarized the basis of its action as follows:

> "The two local boards did act without jurisdiction, the record shows that attempts to secure relief within the Selective Service System would be futile, and the threat to First Amendment rights is of such immediate and irreparable consequence not simply to these students but to others as to require prompt

action by the courts to avoid an erosion of these precious constitutional rights. Under this combination of circumstances an injunction could properly issue." 372 F. 2d at 820.

Relying upon the rationale of *Dombrowski* v. *Pfister*, 380 U.S. 479, the Court held that injunctive relief prior to the exhaustion of administrative remedies was warranted because the effect of the reclassification was to curtail immediately the exercise of the First Amendment rights.

It is apparent that the principles applied in *Wills* and *Wolff* are inapplicable to the present case. In making his decision whether to appeal McKart was neither stifled nor misled by the action of his board. Nor does McKart purport to show that his classification by the board was undertaken as an attempt to curtail the exercise of his freedom of speech or any other Constitutional right.

We do not pass upon the question as to whether McKart would have been entitled to a IV-A classification under 50 U.S.C. § 456(o) if he had exhausted his administrative remedies.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting: Regretfully I cannot agree with the conclusion of my brethren in this case. It is clear that the Defendant had every intention to violate the Selective Service Act, but the fact is that he had no duty under any "directions made pursuant to" the Act that he could be guilty of failing to perform.

Defendant was indicted and tried for failing "to comply with an order of his local board to report for and submit to induction . . ." Section 456(o) of Title 50, App., provides that ". . . the sole surviving son of such family [the father of which was killed in action] *shall not* be inducted . . ." (emphasis added). The local draft board recognized at one time that the Defendant came under this exemption. When the Defendant's mother died, the

board decided that the exemption no longer applied because, in their opinion, there was no "family" left. In my view, that decision was contrary to the clear wording of the statute and to the clear intent of Congress in providing for the exemption. Hence, I conclude that the board's order of induction was not "pursuant to" the Act but in contravention of the Act. Therefore, I can only conclude that regardless of how much he tried, and perhaps even wanted, to violate the Act, the Defendant was not guilty of the offense for which he was indicted and tried.

This is not a case where the existence of the exemption depends upon the board's first making a factual determination. Here the board had already determined that the Defendant was entitled to the exemption; the termination of that exemption resulted from the board's erroneous interpretation of the law. I feel, therefore, that application of the doctrine of exhaustion of administrative remedies is inappropriate in this case.

I would reverse and dismiss the indictment.

MEMORANDUM OF DECISION
(Filed May 16, 1967)

PORTER, J.: Defendant was indicted for willfully and knowingly failing and neglecting to perform a duty required of him under the Selective Service Act in that he failed to comply with an order of his local board to report for and submit to induction into the Armed Forces of the United States. Title 50 App., Section 462, United States Code. He pleaded not guilty, waived a jury trial, and his case was heard by the Court.

The facts are not in dispute and for the most part may be verified by examining the draft board's file (PX 1).

(Appendix)

From this and the testimony, it will be seen that the defendant, whose birthday is February 13, 1943, filled out a questionnaire on his eighteenth birthday. He was not classified until he was twenty years of age. He was classified 1A, and, on February 26, 1963, notified accordingly. No appeal was taken. He was ordered to report on April 21, 1964 for a preinduction physical examination. He failed to report.

On May 1, 1964, he was ordered to report for induction on May 11, 1964, but instead wrote the first of three or four letters (PX 1A) saying in substance he refused to report and stating his reasons. Briefly, his reasons were that he did not believe in killing; that the Selective Service System violated his belief; and he therefore refused to have anything to do with it. He also objected to conscription as slavery.

The draft board replied by sending forms for the defendant to fill out if he sought a CO status. It also stated that it was noted that the defendant indicated on his original questionnaire that he was the sole surviving son of a family which had a father, son or daughter killed while serving in the Armed Services and asked for information.

The young man replied under date of May 20, 1964, returning the form and making it clear he did not wish to become classified as a conscientious objector. "I simply no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he stated: "If I indicated that I was a 'sole surviving son' when I filled out your forms around my eighteenth birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the Second World War. I do not have the specific information you asked for."

(Appendix)

While the defendant did nothing to claim the exemption as a sole surviving son, the draft board on its own initiative cancelled his induction orders and classified him 4A around July 27, 1964. On February 4, 1966, it came to their attention that the boy's mother died. After some correspondence with state and national authorities, they reclassified him 1A, and they ordered him to report on February 24, 1966 for a preinduction physical some time in March, 1966.

On March 12, 1966 the defendant wrote and said he would not report. On March 31, 1966 he was ordered to report on April 21, 1966 for induction. On April 20, 1966 he wrote a letter explaining that he had no intention of doing so. He did not report on April 21, 1966 and was declared delinquent.

At no time did the defendant appeal any order of the Board, and specifically he did not appeal the order that he report for induction April 21, 1966.

Of course, he has not exhausted his administrative remedies. He has simply, from the outset, not had anything to do with the Selective Service System. The defendant did not take the stand and offered no testimony in his own behalf. Hence, the foregoing statement of facts are not contradicted, and the defense offered in his behalf is strictly legal.

It has three parts: first that he is entitled to a 4A classification as a matter of law as a sole surviving son; second, that his classification as 1A by the board was an act in excess of their jurisdiction; and third, he contends that since he is entitled to a 4A classification as a matter of law, he is excused from the requirement that he must exhaust his administrative remedies.

In considering these arguments the case has been treated as if the defendant had claimed the 4A classification. The fact of the matter is, however, he did not claim the exemption he now seeks. The draft board gave it to

him. He simply rejected the whole idea of the draft and persisted in this stand when his mother died and the draft board changed his classification to 1A.

In an Order denying a motion for an injunction in *Muhammad Ali* v. *Breathitt*, dated April 17, 1967 (No. 17,834, United States Court of Appeals for the Sixth Circuit) the Court said:

> "We do not believe that Congress ever intended that draftees should have the right to litigate the validity of their induction before acceptance for National Service."

The Court went on to say:

> "If injunction suits were permitted, interminable delays would undoubtedly result while the cases were being processed in the Courts. Such a procedure would interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the Armed Forces with much-needed personnel."

Much the same common sense reasoning is behind the authorities on which the conclusions of law are based that the defendant cannot raise the legal question he does without first showing that he exhausted his administrative remedies. These cases are *Sicurella* v. *United States*, 348 U.S. 385 (1955); *Sunal* v. *Large*, 332 U.S. 174 (1947); *Cox* v. *United States*, 332 U.S. 442 (1947); *Estep* v. *United States*, 327 U.S. 114 (1946); *Gibson* v. *United States*, 329 U.S. 338 (1946); *Billings* v. *Truesdell*, 321 U.S. 542 (1944); *Falbo* v. *United States*, 320 U.S. 549 (1944). See also, *Pickens* v. *Cox*, 282 F. 2d 784 (10 Cir., 1960).

In *Pickens*, the defendant was inducted into the Army in 1953. In 1954 he was tried before a General Court Martial and sentenced to a dishonorable discharge and confinement for ten years. Pickens petitioned for a writ of habeas corpus on the ground that the Army had no

jurisdiction over him because he was a sole surviving son at the time of his induction, though he did not inform his local board of that status and had never applied for a release from the military on that account. The Court held the burden was upon the registrant to bring himself within any exemption specified within the Selective Service Act. Where the Act declares that sole surviving sons "shall not be inducted," this phrase does not create a disability in the Selective Service Board nor deny it the power to induct, but merely creates a personal privilege or right to exemption in the individual. "Exemption from military service is a matter of legislative grace. The burden is upon the registrant to claim and establish the right to exemption and the exemption may be waived or abandoned like any other personal privilege." *Ibid,* p. 785.

As to the contention that the defendant is entitled to the classification 4A as a matter of law, it should be noted that every defense based on improper classification (in a criminal prosecution under the Selective Service Act) is actually a question of law. When the defense is presented and the trial court is asked to review the administrative board's decision, the criterion is whether there was a basis in fact for the decision, and not whether the trial court would have made the decision. In *Cox* v. *United States, supra,* the Court held that in a criminal prosecution the jury cannot pass on the validity of an administrative order, the question being one for the court, since it is a question of law and not of fact.

An error of law may be a basis for a defense, but only when the defendant has exhausted his administrative remedies. *Sicurella* v. *United States, supra.*

Defendant cites *Estep* in support of his position, but the Court finds this case within the facts of *Falbo* and *Billings,* rather than *Estep.*

It remains only to say on the main point, whether this defendant was required to exhaust his administrative remedies that in Selective Service cases the rule is stricter than it is in other areas of the law, and for good reason, since the idea is to get men into the Army as quickly as possible. Where there is still a chance the Service itself may reject them (as by a physical) then there is no reason for judicial review. Hence, cases involving the futility of administrative remedies in other areas, such as labor law, are not deemed applicable.

This is dispositive and makes unnecessary a consideration of the correctness of the defendant's reclassification following the death of his mother. It should suffice to show why the Court cannot agree with the contentions of the defendant, and why the Court's general finding is that he is guilty.

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

No. 18,194

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK FREDERICK McKART,

Defendant-Appellant.

(Filed June 14, 1968)

Before: PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

JUDGMENT

Appeal from the United States District Court for the Southern District of Ohio

This Cause came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.
/s/ Carl W. Reuss
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 403

JACK FREDERICK MCKART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24) is reported at 395 F. 2d 906.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1968. Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 13, 1968, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who failed to exhaust his administrative remedies, may defend against a criminal prosecution for failure to submit to induction on the ground that he was wrongfully classified I-A in violation of the Selective Service Act.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of willfully and knowingly failing to report for and submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462. On June 22, 1967, petitioner was sentenced to imprisonment for a period of three years. A divided panel of the court of appeals affirmed his conviction.

The facts of the case, which are summarized in both the opinion of the court of appeals (Pet. App. 17-19) and the memorandum decision of the district court (Pet. App. 24-27), are not in dispute.

Petitioner, who was born on February 13, 1943, registered with his local Selective Service board on or about his eighteenth birthday, and shortly thereafter he completed and filed his classification questionnaire (S.S. File 2-6).[1] He was classified I-A by his local

[1] Record references are to petitioner's Selective Service file, which we are lodging with the Clerk of the Court.

board on February 25, 1963, and was notified of this classification on February 26, 1963 (S.S. File 9). Petitioner made no attempt to appeal his classification. On March 23, 1964, he was ordered to report for a pre-induction physical on April 21, 1964 (S.S. File 9, 12), but failed to do so (S.S. File 9, 13). On May 1, 1964, petitioner was ordered to report for induction on May 11, 1964 (S.S. File 9, 14), but once again failed to report as ordered (S.S. File 9).

Instead, on May 10, 1964, petitioner wrote a letter to his draft board stating that he refused to report for induction. The reasons which he set forth in this letter were that he did not believe in killing, that the Selective Service System violated his beliefs, and that he therefore refused to have anything to do with it. He also objected to conscription as slavery. He stated categorically, "I refuse to serve this country armed, and I refuse to serve it unarmed by doing alternative service" (Pet. App. 18).

The draft board replied by furnishing petitioner the form to fill out if he desired to claim conscientious objector status and suggesting that he complete the form and return it. The board also stated in its letter that petitioner had indicated in his original questionnaire that he was the sole surviving son of a family of which one or more members had been killed in action (S.S. File 17), and requested further information on this subject.

On May 20, 1964, petitioner returned the blank form to the board stating that he did "not wish to become classified as a conscientious objector." He reiterated his previous position, saying that "I simply

no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he stated (Pet. App. 18):

> If I indicated that I was a "Sole Surviving Son" when I filled out your forms around my 18th birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the second world war. I do not have the specific information you ask for. [S.S. File 18-19.]

Even though petitioner did nothing to claim an exemption as a sole surviving son (50 U.S.C. App. 456 (o)), the draft board on its own initiative cancelled his induction order and classified him IV-A (S.S. File 9, 29). From July 27, 1964, until February 14, 1966, petitioner remained in the IV-A classification.

Early in 1966, the local board learned of the death of petitioner's mother (Pet. App. 19). His classification was then changed from IV-A to I-A (S.S. File 9). Petitioner was subsequently ordered to report for a physical examination on March 17, 1966, and for induction on April 21, 1966 (S.S. File 9, 32, 36). He failed to comply with either of these orders (S.S. File 33, 37, 51). His criminal prosecution for violation of 50 U.S.C. App. 462 resulted.

ARGUMENT

Both courts below properly concluded that petitioner's complete failure to exhaust his administrative remedies precluded him from asserting the defense that his reclassification as I-A was erroneous as a matter of law.

It has long been established that a registrant who claims to be improperly classified is under an obligation to exhaust his administrative remedies by appeal before asserting the alleged error in his classification as a defense to criminal prosecution. *Falbo* v. *United States*, 320 U.S. 549; *Estep* v. *United States*, 327 U.S. 114, 123. That principle is in accord with the general rule requiring the exhaustion of administrative remedies before agency action can be questioned in court. *E.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52; *Kidd* v. *United States*, 386 F. 2d 422, 423 (C.A. 10); *Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Noland* v. *United States*, 380 F. 2d 1016, 1017 (C.A. 10), certiorari denied, 389 U.S. 945; *Thompson* v. *United States*, 380 F. 2d 86, 88-89 (C.A. 10); *Capson* v. *United States*, 376 F. 2d 814 (C.A. 10), certiorari denied, 389 U.S. 901.

It may be assumed that the rule here involved is subject to exceptions recognized in administrative law generally—*e.g.*, that exhaustion of administrative remedies may be unnecessary where an appeal would clearly be to no avail[2] or where a person has been effectively prevented from taking an appeal.[3] But this

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[2] See *Glover* v. *United States*, 286 F. 2d 84 (C.A. 8), where the appellant had taken an administrative appeal from a prior classification notice and lost, but failed to appeal from the fifth and final notice of classification. The court excused this "procedural irregularity."

[3] In this regard, petitioner's reliance on *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908, is misplaced. There the court of appeals found that the local board did not mail the registrant his notice of delin-

is not such a case. Petitioner was not in any respect prevented from taking an appeal. Nor is it clear that an appeal would have been to no avail. While petitioner's reclassification after his mother's death was made after his local board had consulted with state Selective Service officials, this hardly amounted to formal consideration on appeal. Petitioner recognizes that the proper interpretation of the sole surviving son exemption contained in 50 U.S.C. App. 456(o) is a question of first impression. Thus, this is not a situation where, because of a settled interpretation or approach by the Selective Service System, it could be said that nothing might conceivably be gained by an administrative appeal. Moreover, if petitioner had appealed his reclassification, his appeal might have reached the National Selective Service Appeal Board appointed by the President, which exercises the powers bestowed upon the Chief Executive by 50 U.S.C. App. 460 (b)(3), independent of the Director of Selective Service (32 C.F.R. 1604.6(c)). In addition, there might have been factual circumstances which warranted reconsideration of petitioner's right to a statutory exemption.[4]

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quency until long after the expiration of the period for appeal from his reclassification. The court found that this error by the local board excused petitioner's failure to exhaust administrative remedies.

[4] Our examination of petitioner's Selective Service file discloses that the obituary in the local newspaper which reported the death of petitioner's mother stated that his maternal grandparents were alive at the time of his mother's death (S.S. File 31). The implications of this fact were never brought to the attention of the local board. Since petitioner

We recognize that petitioner claims an absolute statutory exemption and not a deferment conditioned upon the survival of a member of his "family." On that premise, he might have been entitled to pre-induction judicial review of his classification (see Brief for the United States in *Oestereich* v. *United States*, No. 46, this Term). But the nature of the exemption he seeks did not relieve petitioner of the obligation to exhaust administrative appeals.[5] At whatever stage the courts may properly entertain the kind of claim asserted here, it can only be after other available remedies have been pursued. There is no occasion to waive that rule in this case, since—although on narrower grounds than those he urges—effective relief might have been available to petitioner in further administrative proceedings (see note 4, *supra*).

---

refused to contact his local board, we do not know whether they were still living at the time he was reclassified I-A. Nor do we know whether his paternal grandparents were alive at that time. We cannot know whether presentation of existing facts as to petitioner's family would have affected his classification.

[5] For this reason, there is no occasion to consider the alternative ground relied on by the courts below, petitioner's failure to appear for physical examination and report for induction.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1968.

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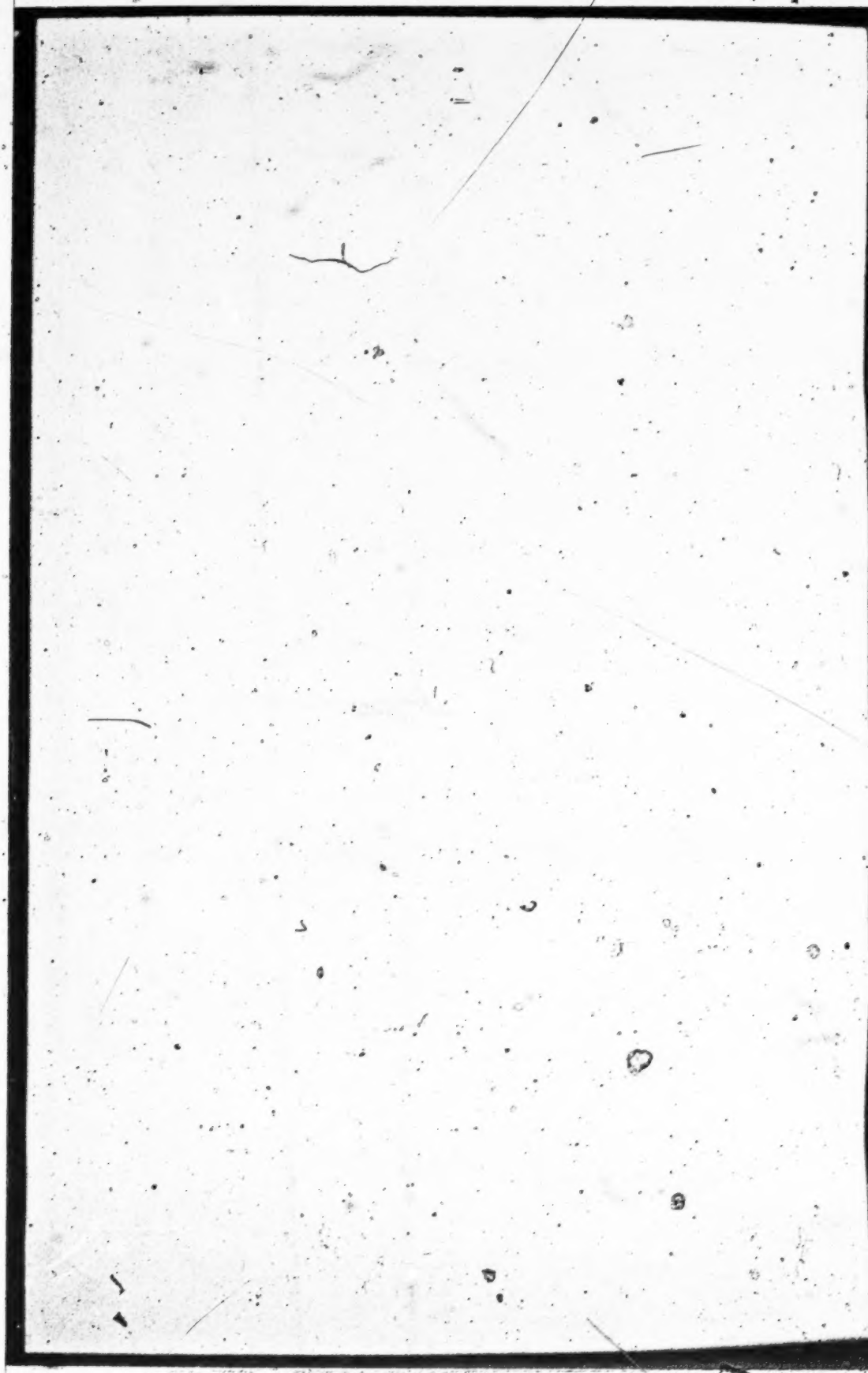

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 403

JACK FREDERICK McKART,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Single Appendix and BRIEF FOR JACK FREDERICK McKART

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CITATIONS TO THE OPINIONS BELOW

The opinion of the court of appeals (A.) is reported at 395 F 2d 906. The opinion of the district court is unreported (A.).

JURISDICTION

The opinion and judgment of the court of appeals was filed and entered on June 14, 1968. On July 9, 1968, Mr. Justice

White extended the time for filing the petition for a writ of certiorari to August 13, 1968. The Petition was filed on August 13, 1968, and was granted on October 28, 1968 (A. 60). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A, sole surviving son, exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?

(2) Does a Selective Service registrant lose his IV-A classification as the sole surviving son of a family whose father was killed in World War II upon the death of his mother, no other children having been born to the family?

STATUTES INVOLVED

50 U.S.C. App. § 456(o) provides:

"(o) Except during the period of a war or a national emergency declared by the Congress after the date of the enactment of the 1964 amendment to this subsection [July 7, 1964], where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces of the United States, or subsequently died as a result of injuries received or disease incurred during such service, the sole surviving son of such family

shall not be inducted for service under the terms of this title [sections 451-454 and 455-471 of this Appendix] unless he volunteers for induction."

50 U.S.C. App. § 462(a) provides in material part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules and regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty...shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by such fine and imprisonment. ..."

STATEMENT OF THE CASE

The Petitioner, Jack Frederick McKart, was indicted under a charge of violating the Universal Military Training and Service Act (50 U.S.C. App. § 462), the indictment alleging that he willfully and knowingly failed to comply with an order of his draft board to report for and to submit to induction into the Armed Forces of the United States on April 21, 1966 (A. 3). He pleaded not guilty and was tried without a jury by the court. On May 16, 1967, the Petitioner was found guilty and subsequently sentenced to three years in jail (A.1 and 2).

The facts of the case are not in dispute. The Petitioner, who was born on February 13, 1943, (A. 40), was classified I-A on February 26, 1963 (A. 4). On May 1, 1964, he was ordered to report for induction on May 11, 1964, but instead wrote to the board stating that as a matter of conscience he could not assist the Selective Service System (A. 4 and 17 - 18).

The draft board then sent him forms to be filled out if he sought a conscientious objector classification. It further noted that he might be eligible for a IV-A classification as being the sole surviving son of a family which had its father killed in the Armed Services (A. 4). In response thereto, the Petitioner refused to make application for a conscientious objector classification but wrote that his "Father was killed in the second World War.". (A. 20 to 24). His draft board cancelled the induction order and classified him IV-A on July 27, 1964, as being a sole sur-

viving son. (A. 5).

On January 30, 1966, the Petitioner's mother died (A. 16). The Petitioner was the sole child of that marriage (A. 11). On February 14, 1966, the draft board, after consultation with state authorities of the Selective Service System, reclassified the Petitioner I-A (A. 12). Although he was a sole surviving son, it was Selective Service's position that there was no longer "any family" (A. 12). After he was reclassified I-A, the Petitioner failed to appeal the reclassification and failed to appear for his April 12, 1966, induction (A. 5).

The trial judge refused to pass on the issue of whether the Petitioner was entitled to a continuance of his IV-A classification, because of the failure of the Petitioner to appeal his c assification on February 14, 1966. The Court decided that Petitioner's conduct constituted a waiver of any rights to a IV-A classification and a failure to exhaust his administrative remedies. (A. 45).

The Petitioner was sentenced to three years imprisonment. He appealled. (A. 1 and 2). The Court of Appeals for the Sixth Circuit affirmed the trial court (opinion by Phillips, J.) with one judge dissenting (Celebrezze, J.) (A. 49 to 58).

The Court of Appeals held that, as the Petitioner had "not appealed his classification through the Selective Service procedures", he could not, in a trial for failure to submit to induction into

the Armed Forces, "raise the defense, upon *wholly undisputed facts*, that he was wrongfully classified in violation of the statute." (A. 52) (emphasis added).

Judge Celebrezze, in dissent, concluded that "the board's order of induction was not 'pursuant to' the /Selective Service/ Act but in contravention of the Act" and that "therefore...regardless of how much he /Petitioner/ tried, and perhaps even wanted, to violate the Act, the Defendant was not guilty of the offense for which he was indicted and tried." Judge Celebrezze also states:

> "This is not a case where the existence of the exemption depends upon the board's first making a factual determination. Here the board had already determined that the Defendant was entitled to the exemption; the termination of the exemption resulted from the board's erroneous interpretation of the law. I feel, therefore, that application of the doctrine of exhaustion of administrative remedies is inappropriate in this case.
>
> I would reverse and dismiss the indictment." (A. 57 and 58).

SUMMARY OF ARGUMENT

The application of the doctrine of exhaustion of administrative remedies is inappropriate in Petitioner's case because:

(a) Administrative remedies constituted a futile and empty formality; and

(b) The issue involved is purely one of law or statutory interpretation.

The position of the Selective Service System on the meaning of § 456(o) of Title 50 App., (sole surviving son exemption) was well established. Exhaustion of administrative remedies would have been futile. For that reason, exhaustion is not required.

In addition, the issue involved is solely one of law or statutory construction. The Selective Service System erroneously construed applicable law in reclassifying Petitioner and ordering him to report for induction. In doing so, it violated a statutory prohibition.

This Court has, in the past, granted judicial relief to persons who have been injured by an act of a government official in excess of his powers. A failure to exhaust administrative remedies has not barred such relief when an agency clearly violated a statutory right of a party. It should not do so here.

Petitioner was reclassified from IV-A to I-A on the basis of an erroneous interpretation of 50 U.S.C. App., § 456 (o). The Selective Service System maintains that Petitioner lost his right to a IV-A exemption upon the death of his mother. It bases this position on the

fact that Petitioner no longer has any immediate family of which he is the survivor.

Further, an analysis of the purposes of the section or the legislative history of the section do not reveal that Congress intended such a requirement.

ARGUMENT

I. THE APPLICATION OF THE DOCTRINE OF THE EXHAUSTION OF ADMINISTRATIVE REMEDIES IS INAPPROPRIATE IN PETITIONER'S CASE BECAUSE:

(A) ADMINISTRATIVE REMEDIES CONSTITUTED A FUTILE AND EMPTY FORMALITY;

AND,

(B) THE ISSUE INVOLVED IS PURELY ONE OF LAW OR STATUTORY INTERPRETATION.

(A) ADMINISTRATIVE REMEDIES CONSTITUTE A FUTILE AND EMPTY FORMALITY.

There were no questions of credibility or factual dispute to be resolved by an administrative agency in Petitioner's case and the position of the Selective Service System on the significance of his mother's death was well established; namely, that because of it, no family existed of which Petitioner could be the sole surviving son. Thus, he was no longer entitled to his IV-A exemption.

When the sole surviving son amendment was passed by Congress in 1964, Selective Service took the position that no change in the status of the registrant's

family would cause a loss of the exemption unless there was the birth of a full brother (A. 33). This was withdrawn in September, 1964 (A. 34). At Petitioner's trial, the Clerk of the Local Board testified that he was reclassified I-A because "Selective Service headquarters in Columbus" (determined) "that he no longer qualified" (for IV-A) "because the family unit ceased to exist" (A. 64).

The State Headquarters wrote to the National Director on May 10, 1966, requesting advice on the situation. The National Headquarters responded by letter dated June 13, 1966. "Inasmuch as there is no family, it is not believed that he qualified for sole surviving son status." This information was then communicated to Petitioner's local board (A. 64 - 66).

Thus, an appeal to the Selective Service System would have accomplished nothing for the Petitioner. Its position was clear and established.

Where exhaustion of administrative remedies would be a fruitless and empty formality, exhaustion is not required. *Leedom v. Kyne*, 358 U.S. 184 (1958); *Skinner and Eddy Corp. v. U.S.*, 249 U.S. 557 (1919); *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (CA 2d, 1967) and *Glover v. U.S.* 286 F. 2d 84 (CA 8th, 1961). Also see 2 AMERICAN JURISPRUDENCE 2d, p. 441:

> "Where it plainly appears that the administrative remedy would be of no value and fruitless, the party seeking judicial relief does not

have to complete administrative procedure before resorting to the courts, particularly where the administrative agency is powerless to afford relief...under the rules and regulations as promulgated by the head of the department..."

(B) THE ISSUE INVOLVED IS PURELY ONE OF LAW OR STATUTORY INTERPRETATION.

The issue here is solely one of law or statutory construction. The Court of Appeals for the Sixth Circuit concluded that the facts were "wholly undisputed."

The Selective Service System erroneously construed the law in Petitioner's case and upon the erroneous construction reclassified Petitioner I-A and ordered him to report for induction. This course of action was completely outside the jurisdictional power of Selective Service. § 456(o) of Title 50, App., provides that "...the sole surviving son of such family (the father of which was killed in action) *shall not* be inducted ..." (emphasis added). Yet Petitioner's draft board acted in clear violation of the above statute in reclassifying him I-A and in ordering him to report for induction.

The Court has, in the past, granted judicial relief to those who have been injured by an act of a government official which is in excess of his express or implied powers. *Harmon v. Brucker*, 355 U.S. 579 (1958); *Stark v. Wickard*, 321 U.S. 288 (1944); *American School v.*

McAnnulty, 187 U.S. 94 (1902).

As this Court stated in the American School case:

> "The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *American School v. McAnnulty*, 187 U.S. 94, 109, 110 (1902).

When an administrative agency has clearly violated a statutory right of a party, by misconstruing the statute, the exhaustion of administrative remedies is not required. *Skinner and Eddy Corp. v. United States*, 249 U.S. 557 (1919); and *Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

In *N.L.R.B. v. Highland Park Mfg. Co.* 341 U.S. 322 (1951), this Court refused to allow the question of standing to bar its review of an order which was totally invalid, prohibited by law, and beyond the jurisdiction of the N.L.R.B.:

"It would be strange indeed if the courts were compelled to enforce, without inquiry, an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal." 341 U.S. at 325 - 236.

For the same reasons, the Courts cannot allow an invalid Selective Service order, based solely on an erroneous interpretation of law, to go unreviewed simply because of a failure to exhaust administrative remedies.

On the same basis, the Courts of Appeals and the District Courts have applied this principle when the doctrine of exhaustion of administrative remedies has been used in an attempt to bar consideration of a pure question of law where there is no factual dispute:

"The District Court is not an appellate court for reviewing draft board decisions. In cases involving disputed factual findings the scope of review is quite narrow, and there

in any basis in fact for the decision of the Board, a registrant's failure to appeal that decision would prevent his attacking it in the courts. However, there is no factual dispute here. The only question, on the basis of the file and stipulation, is whether the undisputed facts entitle the defendant to a I-O classification. The experience of the administrative boards and agencies will generally render them better equipped than the courts to solve factual problems within their respective fields, but, as stated in *Wills v. U.S.*, 384 F.2d 943, where the dispute is on a question of law, 'the exhaustion rule loses much of its force...'" *UNITED STATES v. Carson*, 282 F.Supp. 261, 271 (1968).

In recent cases, the Courts of Appeals have followed this position under similar circumstances. *Wills v. United States*, 384 F.2d 943 (1967) CA9; and *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (CA 2d, 1967).

In *Wolff*, at page 826, Judge Medina stated:

"...it has in the past been suggested when a local board acts in flagrant disregard of the applicable regulations and thus in clear excess of its jurisdiction, the courts may intervene *at any time* to rectify the situation. Thus in *Schwartz v. Strauss*, 206 F.2d 767 (2 Cir. 1953), Judge Frank remarked that he had no doubt that a court would have jurisdiction to review a classification where on undisputed facts the board's lack of

jurisdiction was manifest. On the merits, however, he found that the board had acted properly as a matter of law. And in *Townsend v. Zimmerman*, 237 F.2d 376 (6 Cir. 1956), Judge Stewart, now Justice Stewart, enjoined a threatened induction when it appeared clearly as a matter of law that the board had violated the regulations in issuing the order." (Emphasis added).

As has been shown above, the courts have enjoined actions of administrative agencies, including the Selective Service System, when said actions were clearly in violation of applicable law. However, the Petitioner does not seek to enjoin the Selective Service System. Rather, he seeks only to point out in his own defense that his reclassification and subsequent induction order were in violation of an explicit statutory prohibition. The right of a person to point out a clear violation of a statutory command by an agency, should be at least as broad in a criminal proceeding as it is in an injunctive proceeding.

The refusal on the part of the trial and appellate courts to allow Petitioner to present his defense has permitted an invalid Selective Service Order to go unreviewed by the courts; and Petitioner has been sentenced to three years in prison for his refusal to obey that invalid order.

The Sixth Circuit Court of Appeals relied upon *Falbo v. United States*, 320 U.S. 549 (1944) as interpreted by *Estep*

v. United States, 327 U.S. 114 (1946) to preclude Petitioner from questioning the validity of his Selective Service order because of failure to exhaust his administrative remedies (A. 49 to 58). Petitioner maintains that *Falbo* and *Estep* are not relevant in this matter, because they involved factual determinations by local boards within the competency and jurisdiction of those boards. In those cases there was no question that the boards had the authority to resolve the facts in dispute.

Falbo and *Estep*, together, determined the point in administrative process to which the registrant had to bring himself in order to challenge the factual basis of his classification. *Estep*, in addition, set out the "basis in fact" rule as the standard for judging a local board's exercise of jurisdiction in making factual determinations. *Estep v. United States*, 327 U.S. 114, 122, 123 (1946). However, neither case involved a registrant who claimed his local board violated a statutory prohibition in reclassifying him and ordering him to report for induction.

In the present case there is no dispute of fact and the issue is purely one of law, which the courts are equally as competent, if not more competent, to determine. In fact, it is the duty of the courts to review an erroneous interpretation of Selective Service. With no factual dispute and with a pure issue of law, the doctrine of the exhaustion of administrative remedies as enunciated in *Falbo* and *Estep* simply does not apply.

II. A REGISTRANT WHO IS PROPERLY CLASSIFIED IV-A AS A SOLE SURVIVING SON OF A FAMILY WHOSE FATHER WAS KILLED IN WORLD WAR II DOES NOT LOSE HIS RIGHT TO THAT CLASSIFICATION UPON THE DEATH OF HIS MOTHER, NO OTHER CHILDREN HAVING BEEN BORN TO THE FAMILY.

The question of whether a registrant loses a Selective Service Classification of IV-A, which he received because of the death of his father in combat, upon the death of his mother, leaving no other children in the family, is one of first impression. Counsel for Petitioner have been unable to find any decisions discussing this question. The trial court and the court of appeals found that there was no need to discuss the issue (A. 49 to 58).

The statute (50 U.S.C. App. § 456(o) provides in pertinent part as follows:

"Where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces..., the sole surviving son of such family shall not be inducted for service..."

Petitioner maintains that he is entitled to the exemption as a sole surviving son by reason of the death of his father during World War II and the subsequent death of his mother did not deprive him of the right to that exemption.

Selective Service insists that the right to the exemption ceases when there are no parents or sisters living, be-

cause there is no "family" left. (A. I2).

This position is not supported by an analysis of the words of the statute or the purposes of the statute.

§ 456(o) provides only three conditions upon which the right to the exemption may terminate. A sole surviving son may be drafted only if there is a declaration of war, a declaration of national emergency or he volunteers for service. An obvious, but unwritten and unstated condition, is that the right to the exemption terminates when a second son is born in the family. Congress would have provided explicitly that a IV-A classification terminate with no family remaining, if it so intended. § 456 (o) does not.

This omission in §456(o) has great significance in determining the intent of Congress, if that section is compared with 50 U.S.C. App. §456(h). §456(h) provides that registrants with children and a wife, "with whom they maintain a bona fide *family relationship in their homes*" (emphasis added) are entitled to a III-A or a hardship deferment. In this latter section, Congress clearly set forth that the family relationship exist as a pre-condition for a III-A classification. The absence of a similar condition in §456(o) can only mean that Congress did not intend a similar precondition for a IV-A classification.

The Selective Service System insists that the only purpose of this exemption is to spare the sole surviving son to

comfort and support the remaining members of the family (A.34 and 35). While the Petitioner agrees that this is one purpose, he would maintain it is not the only one. Certainly, one purpose is to leave a male heir to carry on the name of the family. It would be of little comfort to the family to know that the sole surviving son could be inducted and possibly killed, thus cutting off the family name.

Another purpose of this exemption is to spare all members of the family, including the sole surviving son, of any more pain and suffering which might be caused by military service. Finally, this exemption has the purpose of relieving the family of any further military duty, because it has already borne more than its share of civic responsibility in the common defense. If this exemption has these multiple purposes, then Petitioner remained entitled to his IV-A classification upon the death of his mother.

If the sole purpose of this section is to spare the sole surviving son to comfort the remaining members of the family, then it ought to require that he live with them and financially support them. The section contains no such requirement and the Selective Service System has never set forth such a requirement.

The Selective Service System originally adopted the position of Petitioner in Operations Bulletin No. 263 (A. 34 and 33):

"...3. Whenever a registrant has become qualified for exemption as a sole surviving son under 6(c) he should not thereafter be deemed to have lost his right to the exemption by reason of any subsequent change in the status of his family other than the birth of a full brother who is living..."

This Bulletin was later rescinded and no other instructions have been issued by the Selective Service System concerning this section (A. 34 and 35).

This recision was apparently based upon the remarks of Representative Huber, at the time of the original sole surviving son amendment enactment in 1948 (A. 35):

"But under these circumstances, while we are still at peace, I see no reason why we cannot allow these parents who made so costly a sacrifice to have the solace and consolation of having their one remaining son at their side to carry on the family name..." 1964 U.S. Code, Congressional and Administrative News, Volume 2, page 2540.

Petitioner points out that this statement by Representative Huber supports his interpretation of §456(c). The Congressman obviously had in mind that the section would serve the purpose of insuring that the family name would be carried on and the purpose of relieving the family of any further sacrifice. Neither purpose to be fulfilled requires that the immediate family remain alive. The legislative history of the 1964 amendment to

§456(o) makes no mention of the necessity of the existence of a family for obtaining the exemption (pp.A3 and 4).

Apart from the failure of the legislative history to support the interpretation of the Selective Service System, legislative history should not be used in contradiction of the clear meaning of the statute:

> "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous..." Justice Jackson, concurring in *Schwegmann Bros. v. Calvert Distilleries Corp.* 341 U.S. 384, at 396.

A reading of §456(o) reveals that it is anything but "inescapably ambiguous."

Petitioner respectfully submits that the analysis and history of §456(o) demonstrates that the interpretation of the Selective Service System was erroneous and the reclassification of Petitioner from IV-A to I-A was arbitrary and capricious.

CONCLUSION

For the reasons heretofore set forth, Petitioner prays that the judgment of the District Court be reversed and that the indictment be dismissed.

Respectfully,

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APPENDIX

In The

Supreme Court of the United States

October Term, 1968

NO. 403

JACK FREDERICK McKART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 13, 1968

CERTIORARI GRANTED OCTOBER 28, 1968

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PETITIONER'S APPENDIX

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	Criminal
Plaintiff,	)	Indictment
	)	Number
v.	)	11,122
	)	
JACK FREDERICK McKART,	)	
	)	
Defendant.	)	

RELEVANT DOCKET ENTRIES

Nov. 22, 1966	Indictment filed.
Feb. 16, 1967	Case called for Arraignment-Def. appeared in court and represented by counsel Def. arraigned-Plea of Not Guilty entered Continued-Trial date is to be set.
Ap. 27, 1967	Jury Waiver filed by Def.
Ap. 27, 1967	Trial to Court-Def. present with counsel Opening statements waived-Pltf requested continuance-Argued Withdrawn. Testimony

	for Pltf begun and concluded. Deft voir dired witnesses and made Motion to Dismiss Indictment-Argued Reserved for consideration. Submitted on Motion and Merits for a directed Verdict.
May 16, 1967	GENERAL FINDING, filed by J. Porter-Deft. GUILTY as charged. Copies to Counsel.
May 16, 1967	MEMORANDUM OF DECISION, filed by J. Porter-Copies to Counsel.
May 25, 1967	Case called for sentencing-Deft. here with Counsel-cause cont. for pre-sentencing Investigation OR Bond cont.
June 22, 1967	Case called for sent. Deft. here with Counsel-sent. 3 yrs. impr. with stay of execution for time necessary pending Appeal-$1,000 OR Bond set, Deft. may go to Chicago while out on Bond-Issued, USM
June 28, 1967	NOTICE OF APPEAL, filed by Deft.-Issued 6th Circuit Ct. of Appeals.
Aug. 25, 1967	Excerpts of Pro-

ceedings (All Test. & Closing Argument of Deft.)filed by Court Reporter

= = = = =

INDICTMENT

(Title omitted in printing.)

The Grand Jury charges:

That on or about the 21st of April, 1966, in the Southern District of Ohio, Western Division, at Hamilton Ohio, JACK FREDERICK McKART wilfully and knowingly did fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act and the rules, regulations, and directions duly made pursuant thereto, in that he did fail and neglect to comply with an order of his local board to report for and submit to induction into the Armed Forces of the United States.

In violation of Title 50 App., Section 462, United States Code.

A true bill.

/s/ Paul Brogan
FOREMAN

ROBERT M. DRAPER
United States Attorney

/s/ Charles G. Heyd
CHARLES G. HEYD
First Ass't. United States Attny.

MINUTES OF LOCAL BOARD MEETINGS

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	Vote	
		Yes	No
1/9/63	SSS Form 127 Mailed		
2/4/63	SSS Form 127 mailed to registrant		
2/25/63	Classified 1A RHW	2	0
2/26 63	SSS Form 110 mailed to registrant		
11/13 63	SSS Form 127 mailed to registrant		
3/9/64	SSS Form 127 mailed		
3/23 64	SSS Form 223 mailed registrant to report 4/21/64		
4/21 64	Failed to report for PIPE		
4/27 64	Delinquent EA ERBS	2	0
4/28 64	SSS Form 304 (Notice of Delinquency) mailed to registrant		
5/1/64	SSS Form 252 mailed to registrant. To report 5/11/64		
5/11 64	Failed to report for induction. Received Special Delivery letter from registrant, stating he refuses to report for induction or to serve the country unarmed by doing alternative service. Letter to Registrant requesting information relative to claim of "Sole Surviving Son", SSS 150, Spec.		

	Form for C.O. mailed		
5/21 64	SSS Form 150 returned, registrant declines to complete. Letter from registrant indicates his father was killed in second World War, but he gives no other information.		
6/8/64	Reviewed RHW	2	0
7/1/64	State Director requested, per 1625.3 that this registrant's classification be reopened and considered anew.		
7/27 64	Reviewed, reopened, classified 4-A and induction cancelled. EA ERBS	3	0
7/28 64	SSS Form 110 mailed registrant and mimeo 03-187		
2/14 66	SSS Form 127 mailed registrant		
2/14 66	Classified 1A RHW	3	0
2/15 66	SSS Form 110 mailed registrant		
2/24 66	SSS Form 223 mailed registrant to report 3/17/66		
3/17 66	Failed to report for PIPE		
3/21 66	Delinquent EA ERBS	3	0
3/22 66	SSS Form 304 mailed to registrant		
3/31 66	SSS Form 252 mailed to registrant to report 4/21/66		
4/21 66	Failed to report for induction.		

6/24 66	SSS form 301 mailed to U.S. Attorney		
11/22 66	File to State Headquarters per request Col. Russell		

EXCERPTS FROM TESTIMONY
OF EVELYN C. JUNKIN

TAKEN FROM THE RECORD OF PROCEEDINGS

(Filed April 26, 1967)

* * * * * * *

Q. Mrs. Junkin, do the records of Local Board number 9 indicates when Jack Frederick McKart registered with the Selective Service System?

A. Yes, sir.

Q. And what do the records show as to the date that he registered with Selective Service?

A. He registered February 17, 1961.

* * * * * * *

Q. Did the registrant Jack F. McKart subsequently receive a classification from Local Board number 9?

A. Yes, he did.

Q. On what date, ma'am?

A. Form 110, notice of classification, was mailed to him on February the 26th, 1963.

Q. And on what date had the Board assigned him that classification?

A. On February the 25th, 1963.

Q. And what classification did the registrant Jack F. McKart receive on February 25, 1963?

A. Classified I-A.

(Thereupon, a "Selective Service System Notice of Classification," SSS Form 110, was marked Plaintiff's Exhibit No. 2 for identification.)

Q. I will ask you whether the notice was furnished him at that time contained in addition to the information that he had been placed in Class I-A, information concerning the right to appeal that classification and the means of accomplishing that appeal.

A. Yes, sir.

* * * * * * *

Q. Did the registrant Jack McKart subsequent to February 25th or 26th, 1963 appeal the I-A classification which was given him at that time?

A. No sir.

Q. Subsequent to his classification in I-A, on or about February 25th, 1963 what action was taken with respect to this registrant by the local board?

A. Well, in November of '63 we sent him a current information questionnaire to bring his records up to date.

Q. Was that returned?

A. No. And again in March of '64 we sent him a current information questionnaire.

Q. What was the date on which in March of 1964 that the informational

questionnaire was sent?

A. March the 9th.

Q. And do the records of the Board show whether or not that questionnaire was returned?

A. It was not.

Q. What happened after that date with respect to this registrant?

A. Well, on March the 23rd, 1964 he was mailed an SSS Form 223, "Order to report for Armed Forces physical examination," and he was to report on April the 21st, 1964.

Q. Where was he to report?

A. To the Local Board office.

Q. And does the record of the Board indicate whether in fact he did report on April 21st for the purpose of that examination?

A. He did not report.

Q. And subsequent to that time was he ordered to report for induction by the Local Board?

A. Yes, sir.

Q. On what date was he ordered to report for induction?

A. On May the 1st, 1964 he was mailed an SSS Form 252, "Order to report for induction," to report on May the 11th, 1964.

Q. And did he in fact report on May the 11th, 1964 for induction?

A. No, sir.

* * * * * * *

Q. Do the records of Local Board number 9 show whether in fact the registrant Jack Frederick McKart reported on May 11th, 1964 to Local Board number 9 for the purpose of induction?

A. He did not.

* * * * * * *

Q. Now, Mrs. Junkin, calling your attention to the letter received from the registrant which was dated on or about May 21st, 1964, I will ask you to indicate to the Court the substance of that letter.

A. Person states: "I received your letter of May 11 and the Special Form for Conscientious Objector. Apparently my letter of May 10 was not clear. I do not wish to become classified as a conscientious objector. I simply no longer want to have anything to do with the Selective Service System."

Q. O.K. Now, did the form which you had furnished the registrant on or about May 11th, did that accompany his letter of May 21st?

A. It did.

Q. And was it completed?

A. It was not.

Q. And did his letter of May 21st also contain some information in response to your question about his being a sole surviving son?

A. (Examining.) Yes.

Q. And did you subsequent to that time receive additional information from the registrant concerning his possible status as a sole surviving son?

A. Yes. We wrote him a letter and requested the name of the person, date of birth, date of entry into service, grade and rank at time of death, branch of service and any other informttion.

Q. And did he furnish any or all or this information?

A. Yes, sir.

Q. O.K. And subsequent to your receipt of this information was a change made in his classification?

A. Yes, sir.

Q. And on what date was he placed in this classification?

A. July 27th, 1964.

Q. O.K. What disposition, if any, was made of the prior order to report for induction?

A. It was cancelled.

Q. And until what date did the registrant remain in classification IV-A?

A. Until February the 14th, 1966.

Q. And on February the 14th, 1966 into what classification was the registrant placed?

A. Class I-A.

Q. And what was the basis for the change of classification from IV-A to I-A?

A. Information was received that the registrant's mother had passed away, and our Selective Service headquarters in Columbus was contacted to determine if he would still qualify as a sole surviving son; and it was their opinion that he no longer qualified because the family unit ceased to exist.

Q. And was he notified of the change of classification which occured on February 14th, 1966?

A. Yes, sir.

Q. In what manner was he notified, ma'am?

A. Again a notice of classification, SSS Form 110, was mailed to him on the 15th.

Q. And did the form that was mailed to him on February 15th, 1966 concern information concerning his right to appeal and the methods to bring about an appeal?

A. Yes, sir.

Q. And was that information substan-

tially the same as the information that is contained on what's been admitted into evidence as Plaintiff's Exhibit number 2?

A. Yes, sir.

Q. And did he, subsequent to the receipt of that notification, appeal his classification of I-A?

A. No, sir.

* * * * * * *

Q. And I think you have answered this, but He did not appeal, did he?

A. No, sir.

Q. What action was taken with respect to the registrant Jack McKart subsequent to February the 15th, 1966?

A. On February 24th, '66 he was mailed an order to report for preinduction physical examination on March the 17th.

Q. And do the records of the Board indicate whether he did report for that physical?

A. The records indicate he failed to report for preinduction.

Q. Where was he ordered to report?

A. To the Local Board office.

Q. In Hamilton, Ohio?

A. Yes, sir.

Q. And you have indicated he did not

report; is that correct?

A. Yes, sir.

Q. Subsequent to that what action was taken by the Board with respect to this registrant?

A. At the Local Board meeting on March the 21st, 1966 he was declared delinquent for failure to report for induction and notified on the 22nd of March that he was cited as a delinquent.

* * * * * *

Q. All right. And I think you have indicated that subsequent to the receipt of that letter the registrant Jack McKart was ordered for induction; is that correct?

A. Correct.

Q. Was there mailed to him a notice ordering him to report for induction?

A. Notice was mailed on March the 31st, 1966 to report on April the 21st, 1966.

Q. And to where was he to report?

A. To Local Board office, 633 High Street, Hamilton, Ohio for forwarding to an Armed Forces induction station.

Q. And on April 21st, 1966 did the registrant Jack McKart report for induction as so ordered?

A. No sir.

* * * * * *

Q. Did the registrant Jock McKart at any time, according to the records of Local Board number 9, appeal any I-A classification or any classification that he had been given by the Board?

A. There is no evidence of that.

* * * * * * *

EXCERPTS FROM TESTIMONY
OF FREDERICK W. SCHAIBE

TAKEN FROM THE RECORD OF PROCEEDINGS

(Filed April 26, 1967)

* * * * * * *

Q. Mr. Schaibe, just a couple of questions.

During much of Jack McKart's life he lived with his granparents, did he not?

A. Yes, sir.

Q. That is Mr. and Mrs.?

A. Antone Schaibe.

Q. Those granparents are your parents; isn't that correct?

A. Yes. They are still alive.

Q. And both of them are still alive?

A. Uh-huh.

Q. And your sister died in what, January of '66?

A. January 30th, 1966.

* * * * * *

Q. Preston McKart, the father of Jack McKart, had parents as well, sidn't he?

A. Yes.

Q. Preston McKart's mother is still alive, is she not?

A. I understand she is.

Q. Yes.

A. I mean I haven't seen her.

Q. And Preston McKart, that is the father of Jack McKart who is now deceas ed, also has a father that is alive, do does he not?

A. No. I can't answer that.

Q. You don't know?

A. No.

Q. But at least the paternal grandmother of the Defendant Jack McKart is still alive; is that correct, according to your information?

A. To my information, yes.

* * * * * *

CORRESPONDENCE BETWEEN PETITIONER AND LOCAL BOARD NO. 9

(Plaintiff's Exhibit No. 1-A)

171 Michael Ave.
Hamilton, Ohio
May 10, 1964

Selective Service Board No. 9
Butler County
633 High Street
Hamilton, Ohio

Gentlemen:

You have sent me a notice ordering me to report for induction into the armed forces tomorrow morning. (This I refuse to do and these are the reasons why.

I do not believe in killing and I cannot, in conscience, allow myself to be trained to kill, which is what the armed forces trains a person to do. To me it is morally wrong to kill any person for any reason.

The Selective Service System violates this belief of mine, and therefore I refuse to have anything to do with it. From the time I registered I have answered no letter from your office. I only send you this letter as a matter of courtesy to let you know where I stand.

I also object to the fact that the government forces people to serve it by conscripting them. The government has no moral right to do this. Conscription is only another term for slavery. This also is why I haven't tried to be classified as a conscientious objector to do alternative service. The decision as to whe-

ther a person will serve a country, and as to whether he will serve that country armed or unarmed, must be left up to the individual. I refure to serve this country armed, and I refuse to serve it unarmed by doing alternative service.

Further evidence of the unjustness of the Selective Service System and of the government in dealing with individuals is shown in the statement of personal history you sent with the induction notice. You ask race on this form. Why: You ask if I have "ever been a member of the Communist Party U.S.A., or any communist organizations anywhere." And you ask other questions about my associations with other organizations and with people. To these questions I answer: This is none of your business. No agency of the government and no representative of the government has any right to ask me questions of this nature.

What I have written so far should let you know where I stand. Yes, I am guilty of breaking your law (the Universal Military Tra ning and Service Act, as you call it), but at the same time I am also guilty of not wanting to kill other human beings. Had you lived in Germany of the 1930's, would you have so unquestionably and blindly obeyed Hitler's laws as you blindly obey this unjust conscription law?

You want me to be a murderer for the state. This I refuse to do.

Sincerely,

/s/ Jack McKart

A. 18

(Exhibit page 17.)

Local Board No. 9
Butler County
633 High Street
Hamilton, Ohio

45011

May 11, 1964 33-9-43-86

Jack Frederick McKart
320 N. 9th St.
Hamilton, Ohio

Dear Sir:

After receiving your letter of May 10th we again reviewed your file.

At the time you completed your Questionnaire you gave no information to indicate your feeling about serving your Country.

We request you complete and return the attached form, or return it with a statement declining to complete it.

Further, we note you completed Series XIII, Sole Surviving Son to indicate you are the sole surviving son of a family of which one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service.

You gave no information to indicate who was lost in service. We request the serial number, place and cause of death of the brother or sister. If the one lost in service was your father, we will appreciate the same information.

By Direction of

Local Board No. 9
Butler County, Ohio

Evelyn C. Junkin
Clerk

Encl.

(Exhibit pages 18-19)

171 Michael Avenue
Hamilton, Ohio
May 20, 1964

Selective Service Board No. 9
Butler County
633 High Street
Hamilton, Ohio

Gentlemen:

I received your letter of May 11 and the Special Form for Conscientious Objector. Apparently my letter of May 10 was not clear to you. I do not wish to become classified as a conscientious objector and I said so in my previous letter. I simply no longer want to have anything to do with the Selective Service System.

Did you send this form thinking I would reconsider and back down, and violate my beliefs? I am as opposed to the government (any government) "drafting" people, whether for the armed forces or for civiliam service, as I am to killing. It must be left up to the individual to decide how he will serve his government, if he is going to serve it at all.

Maybe you aren't aware of what Daniel

Webster, the American statesman, said in the U.S. House of Representatives on January 14, 1814. In case you aren't familiar with this speech, this is what Mr. Webster said:

"Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents and parents from their children, and compel them to fight the battle of any war in which the folly or wickedness of the government may engage itself?

"Under what concealment has this power lain hidden, which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest right of personal liberty? Who will show me any Constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, whenever the purposes of an ambitious and mischevious government may require it?

"I almost disdain to go to quotations and references to prove that such an abominable doctrine has no foundation in the Constitution of this country. It is enough to know that that instrument was intended as the basis of a free government, and that the power contended for is incompatible with any notion of personal liberty.

"A free govennment with an uncontrolled power of military conscription, is the most ridiculous and abominable contradiction and nonsense that ever

entered into the head of men."

Even though these words were spoken 150 years ago, they still have meaning.

But beyond this issue of conscription, let us consider what this conscription is for: to be trained to kill human beings. In the two world wars and the Korean war, nearly 69 million people were killed. You would think that today we are civilized enough and have learned to end forever this slaughter of one another. But here you are, sending me notices "ordering" (no one even asked how I felt about it) me to be trained to kill some other young guy who is probably a lot like myself. We both share in common many things - we're both young, we're eager, we have a whole lifetime ahead of us and we want to live it. But the leaders of the countries we live in cannot get along with each other, so they order us to kill each other. And these leaders who order this mass killing, and are responsible for it, become heroes in the eyes of the people and they have fooled the people into respecting them. And yet, if some able worker is laid off his job and can't find work, and then robs in order to feed his family, he is accused of being shiftless and no-good, and he is jailed. He robbed someone of food or money to buy food for his wife and children, and for this people look upon him as being the lowliest creature on earth. And the leaders of a warring country rob that country of the lives of young men so that they can stay in power, and people look upon these leaders as being the noblest creatures on earth. What hypocrisy!

Yes you would think we would have learned by now, but it is evident we haven't. More people, though, are shaking this notion that the government has brainwashed into us, that war and killing and conscription are necessary. Max Born, the Nobel Prize winning physicist, recently stated it this way:

> "Whoever still believes in war as a legitimate instrument of politics and clings to the traditional ideas of a hero's death for sake of wife and child and defense of the homeland should now realize that these are fairy tales and not nice ones at that."

In your letter you say: "At the time you completed your Questionnaire you gave no information to indicate your feeling about serving your Country." Is this so strange? That was over three years ago, and in three years a person is capable of developing in his thinking. On my 18th birthday I felt essentially the same about conscription and killing as I do now, and I registered only because I wasn't sure of how I would approach you, the draft board, on this subject. Now I believe there is only one course for me to take and that is to tell you I no longer want to have anything to do with the Selective Service System.

If I indicated that I was a "Sole Surviving Son" when I filled out your forms around my 18th birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the second world war. I do not have the specific information

you ask for.

I am sure you will find that this letter answers most of your questions.

Sincerely,

/s/ Jack McKart

(Enclosed with this is a blank SSS Form 150, "Special Form for Conscientious Objector", addressed to Jack Frederick McKart)

(Exhibit page 26)

SELECTIVE SERVICE SYSTEM
Local Board No. 9
Butler County
633 High Street
Hamilton, Ohio

(Letterhead with local board stamp)

June 24, 1964

Jack Frederick McKart
171 Michael Avenue
Hamilton, Ohio

Dear Sir:

In your letter of May 20, 1964 you advised us that your father was killed in World War II. So that all aspects of your case may be considered will you please give us as much as possible of the following information, concerning your father.

Name *PRESTON MONROE McKART*

Date of Birth *sometime in 1918 or 1919*
(He was born in Nashville, Tennessee)

(Don't know exact date)

Date of entry into service *sometime prior to 1943 (Don't know exact date)*

Grade or rank at time of death *SECOND LIEUTENANT (aerial navigator)*

Branch of Service *ARMY AIR CORPS*

Any other information that will assist in identification.
I BELIEVE HE WAS KILLED SOMETIME IN 1944. AGAIN, I DON'T KNOW THE EXACT DATE OR ANY OF THE DETAILS.

Your cooperation will be greatly appreciated. Please use the enclosed envelope which requires no postage.

By Direction of

Local Board No. 9
Butler County, Ohio

/s/ Evelyn C. Junkin
Evelyn C. Junkin
Clerk

6-26-64
Checked with Butler County Veterans Service Representative, he could not give all details but advised the Widow's Pension claim was number

XC-3650835

(Exhibit page 29)

OHIO SELECTIVE SERVICE SYSTEM

Local Board No. 9
Butler County
633 High Street
Hamilton, Ohio

(Typed heading with local board stamp)

July 27, 1964

Jack F. McKart
171 Michael Ave.
Hamilton, Ohio

Dear Sir:

Your order to report for (Preinduction Physical Examination) and (Induction) has been cancelled for the following reason:

You are a student.

You are married.

You are a Father.

You are a member of a Reserve Unit.

xx Other. You are a sole surviving son per Public Law 88-360.

Please continue to keep this board advised of any change in your address, physical condition, occupation, marital, family, dependency or military status.

By Direction of the Board:

A. 26

/s/ Evelyn C. Junkin
(Clerk)

(03-187)

(Exhibit page 33)

1762 North Clark Street
Apt. 39
Chicago, Illinois 60614
March 12, 1966

Selective Service Board No. 9
633 High Street
Hamilton, Ohio

Sirs:

I am writing to let you know that on March 14 I will not appear at your office at 6:30 in the morning as ordered to take an armed forces physical examination. My reasons for not appearing should be clear to you if you will reread the two letters I sent to your office in May of 1964.

/s/ Jack McKart

(Exhibit page 35)

Approval
Not Required.

Selective Service System
DELINQUENCY NOTICE
(SEAL)

Local Board
No. 9
Butler County
633 High St.
Hamilton, Ohio

March 21, 1966
(Date Became Delinquent)

March 22, 1966
(Date of Mailing)

(Local Board Stamp)

SELECTIVE SERVICE NO.
33-9-43-86

TO: Jack Frederick McKart

ADD: 1762 North Clark Street Apt. 39

Chicago Cook Ill. 60614

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Report for preinduction physical examination on March 17, 1966.

2. You are hereby directed to report to thes local board immediately, either in person or by mail.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as $10,000, or by both such fine and imprisonment.

/s/ Eugene A. Erbs
Member or Clerk of
Local Board

SSS Form No. 304 (9-9-60)

DELINQUENT REGISTRANT

Approval Not Required

(Seal)

Selective Service System
ORDER TO REPORT FOR INDUCTION

Local Board No. 9
Butler County
633 High Street
Hamilton, Ohio 45011
(Local Board Stamp)

The President of the United States,

To

Jack Frederick McKart
1762 N. Clark St. Apt. 39
Chicago, Illinois

Mar 31, 1966 (stamp)
(Date of mailing)

SELECTIVE SERVICE NO.
33-9-43-86

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report at Local Board No. 9 Butler County 633 High Street Hamilton, Ohio 45011 on April 21, 1966 at 6:45 AM for forwarding to an Armed Forces Induction Station.

/s/ E.A. Erbs
(Member or clerk of Local Board)

A. 29

IMPORTANT NOTICE

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documsnts are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you. (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE - original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD - certified court order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant) - (1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT - affidavits establishing that dependency.

Bring your Social Security Account Number card. If you do not have one, apply at nearest Social Security Administration

Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship,

go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you.

SSS Form No. 252 (Revised 11-27-63)

(Exhibit page 37)

1762 North Clark Street
Apt. 39
April 20, 1966 Chicago, Illinois 60614

Selective Service Board No. 9
633 High Street
Hamilton, Ohio

Sirs:

This is to inform you that I refuse to report to your office tomorrow morning as ordered for induction into the armed forces. I cannot allow any government to order me to do something which goes against my conscience, and being conscripted to kill is one of these things.

All I want is to be left alone to live my life as I see fit. I must be the one to decide how my life is to be lived; no other person can make these decisions for me. The only obligation this entails is that I do no harm to any other person, and so long as I harm no one else, no person or government has any right to interfere with my life.

Sincerely,

/s/ Jack McKart

Sincerely,

/s/ Jack McKart

At 12

OPERATIONS BULLETIN NO. 263

National Headquarters
SELECTIVE SERVICE SYSTEM
(Letterhead)

SSS Reg.
1622.40(a)(9)
1630.4 (c)

OPERATIONS BULLETIN NO. 263

ISSUED: AUGUST 14, 1964

SUBJECT: EXEMPTION OF SOLE SURVIVING SONS FROM INDUCTION

1. Section 6(o) of the Universal Military Training and Service Act, as amended on July 7, 1964, by Public Law 88-360 is quoted in Operations Bulletin No. 261.

2. Section 6(o) was amended in three respects: first, to additionally provide where the father of a family has died as a result of his military service, that a registrant who is the sole surviving son of the family shall not be inducted; second, that the registrant by volunteering for induction may waive the exemption afforded him by section 6(o); and third, that the registrant shall not be eligible for that exemption during a period of a war or national emergency declared by the Congress.

3. Whenever a registrant has become qualified for exemption as a sole surviving son under section 6(o), he should not thereafter be deemed to have lost his right to the exemption by reason of any subsequent change in the status of

his family other than the birth of a full brother who is still living.

/s/ Lewis B. Hershey
DIRECTOR

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SELECTIVE SERVICE LETTER TO COUNSEL

National Headquarters
SELECTIVE SERVICE SYSTEM
(Letterhead)

MAR 10 1967

Mr. Arnold Morelli
Bauer, Swain & Morelli
Attorneys at Law
503 Executive Building
35 East Seventh Street
Cincinnati, Ohio 45202

Subject: Jack Frederick McKart SS No. 33-9-43-86

Dear Mr. Morelli:

This is in reply to your letter of February 28, 1967, in which you posed several questions and asked that we send you the legislative history concerning the 1964 amendment to section 6(o) of the Universal Military Training and Service Act, as amended, or furnish you the citation.

Since Operations Bulletin No. 263 was rescinded no further rulings or interpretations concerning section 6(o) have been made, and our office has not issued any other instructions concerning it to local boards. The legislative history

concerning the 1964 amendment may be found in U.S. Code Congressional and Administrative News, 88th Congress - Second Session, 1964, at page 2539.

We feel that Representative Huber expressed the intent of Congress in his remarks made at that time that he submitted the sole-surviving-son amendment to the 1948 Act. He said, (page 2540)"***But under these circumstances, while we are still at peace, I see no reason why we cannot allow these parents to made so costly a sacrifice to have the solace and consolation of having their own remaining son at their side to carry on the family's name."

We hope that the above will be helpful to you.

For the Director,

/s/ Daniel O. Omer
DANIEL O. OMER
General Counsel

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REPORT OF COMMITTEE ON ARMED FORCES

88th Congress 1st Session — HOUSE OF REPRESENTATIVES — Report No.502

EXEMPTION FROM INDUCTION OF SOLE SURVIVING SON OF FAMILY WHOSE FATHER DIED AS RESULT OF MILITARY SERVICE

July 9, 1963 - Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Rivers of South Carolina, from the

Committee on Armed Services, submitted the following

REPORT

(to accompany H.R. 2664)

The Committee on Armed Services, to whom was referred the bill (H.R. 2664) to amend section 6(o) of the Universal Military Training and Service Act to provide an exemption from induction for the sole surviving son of a family whose father dies as a result of military service, having considered the same, report favorably thereon with an amendment and recommend that the bill do pass.

The amendment is as follows:

On page 1, lines 4 and 5, strike out the words "by inserting 'the father or' immediately after 'Where'.", insert a dash after the word "amended", and the following:

(1) by inserting the words "the father or" after the word "Where"; and

(2) by inserting the words "unless he volunteers for induction" after the words "of this title".

The purpose of the proposed legislation, as amended, is to amend section 6(o) of the Universal Military Training and Service Act to provide an exemption from induction for the sole surviving son of a family whose father died as a result of military service.

Under section 6(o) of existing law, if one or more sons or daughters of a family are killed in action or died in line of duty while serving in Armed Forces of the United States or subsequently die as a result of injuries received or disease incurred during such

service, then the sole surviving son of such family may not be inducted.

It will be noted that this exemption from induction is only applicable where a son or daughter dies as a result of active service and then the exemption applies to the remaining son. Existing law does not exempt from induction a sole surviving son whose father died as a result of active service.

In the opinion of the Committee on Armed Services, this exemption should be enlarged to include the latter group of individuals, so long as they are not precluded from volunteering for induction.

The Army, in commenting on the proposed legislation for the Department of Defense, interposed no objection to the proposed legislation provided it is amended to permit voluntary induction. The Army stated in its letter to the chairman:

> If voluntary enlistments are suspended in time of emergency or otherwise, the bill would preclude voluntary, as well as involuntary, induction of the persons affected. Accordingly, such persons would be barred from military service. Therefore, the Department of Defense recommends that the proposal be restricted to involuntary inductions as provided in the inclosed substitute draft bill. To be consistent, the substitute draft bill further amends section 6 of the Universal Military Training and Service Act to permit voluntary induction of the sole surviving son of a family.

where one or more sons or daughters of such family were killed in action or died in line of duty.

The committee adopted the amendment recommended by the Department of the Army.

The Committee on Armed Services unanimously recommends enactment of the proposed legislation, as amended.

The Department of the Army for the Department of Defense, the Bureau of the Budget, and the Selective Service System interpose no objection, as indicated by the following letters hereby made a part of this report.

Summary of H.R. 2664

Purpose of the bill: To provide an exemption from induction for the sole surviving son of a family whose father died as a result of military service.

The bill amends the existing law.

Explanation of the bill: At present exemption from induction is only applicable where a son or daughter dies as a result of active service, and then the exemption applies to the remaining son. Enactment of this legislation will also include the father who dies as a result of military service. Also, enactment will be restricted to involuntary inductions.

Explanation of committee amendments: Existing law does not exempt from induction a sole surviving son whose father died as a result of active service. This amendment will extend exemption to

this group, but permit voluntary induction.

Fiscal data: No cost to the Government.

Departmental data: The Department of the Army for the Department of Defense, the Bureau of the Budget, and the Selective Service System interpose no objection.

Committee position: The Committee on the Armed Services unanimously recommend enactment, as amended.

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GENERAL FINDING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title omitted in printing.)

(Filed May 16, 1967)

This case was tried to the Court, the defendant having waived in writing his right to a jury trial. The general finding of the Court is that the defendant is guilty as charged in the indictment. See Memorandum of Decision filed herein.

/s/ David S. Porter
Judge

MEMORANDUM OF DECISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Title omitted in printing.)

(Filed May 16, 1967)

PORTER, J.: Defendant was indicted for willfully and knowingly failing and neglecting to perform a duty required of him under the Selective Service Act in that he failed to comply with an order of his local board to report for and submit to induction into the Armed Forces of the United States. Title 50 App., Section 462, United States Code. He pleaded not guilty, waived a jury trial, and his case was heard by the Court.

The facts are not in dispute and for the most part may be verified by examining the draft board's file (PX 1).

From this and the testimony, it will be seen that the defendant, whose birthday is February 13, 1943, filled out a questionnaire on his eighteenth birthday. He was not classified until he was twenty years of age. He was classified IA, and, on February 26, 1963, notified accordingly. No appeal was taken.

On May 1, 1964, he was ordered to report for induction on May 11, 1964, but instead wrote the first of three or four letters (PX 1A) saying in substance he refused to report and stating his reasons. Briefly, his reasons were that

he did not believe in killing; that the Selective Service System violated his belief; and he therefore refused to have anything to do with it. He also objected to conscription as slavery.

The draft board replied by sending forms for the defendant to fill out if he sought a CO status. It also stated that it was noted that the defendant indicated on his original questionnaire that he was the sole surviving son of a family which had a father, son or daughter killed while serving in the Armed Services and asked for information.

The young man replied under date of May 20, 1964, returning the form and making it clear he did not wish to become classified as a conscientious objector. "I simply no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he stated: "If I indicated that I was a 'sole surviving son' when I filled out your forms around my eighteenth birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the Second World War. I do not have the specific information you asked for."

While the defendant did nothing to claim the exemption as a sole surviving son, the draft board on its own initiative cancelled his induction orders and classified him IVA around July 27, 1964. On February 4, 1966, it came to their attention that the boy's mother had died. After some correspondence with state and national authorities, they classified him IA, and they ordered him to report on February 24, 1966 for a pre-induction physical some time in

March, 1966.

On March 12, 1966, the defendant wrote and said he would not report. On March 31, 1966 he was ordered to report on April 21, 1966 for induction. On April 20, 1966 he wrote a letter explaining that he had no intention of doing so. He did not report on April 21, 1966 and was declared delinquent.

At no time did the defendant appeal any order of the Board, and specifically he did not appeal the order that he report for induction on April 21, 1966.

Of course, he has not exhausted his administrative remedies. He has simply, from the outset, not had anything to do with the Selective Service System. The defendant did not take the stand and offered no testimony in his own behalf. Hence, the foregoing statement of facts are not contradicted, and the defense offered in his behalf is strictly legal.

It has three parts: first that he is entitled to a IVA classification as a matter of law as a sole surviving son; second, that his classification as IA by the board was an act in excess of their jurisdiction; and third, he contends that since he is entitled to a IVA classification as a matter of law, he is excused from the requirement that he must exhaust his administrative remedies.

In considering these arguments the case has been treated as if the defendant had claimed the IVA classification. The fact of the matter is, however, he did not claim the exemption he now seeks. The draft board gave it to him.

He simply rejected the whole idea of the draft and persisted in this stand when his mother died and the draft board changed his classification to IA.

In an Order denying a motion for an injunction in *Muhammad Ali* v. *Breathitt*, dated April 17, 1967 (No. 17,834, United States Court of Appeals for the Sixth Circuit) the Court said:

> "We do not believe that Congress ever intended that draftees should have the right to litigate the validity of their induction before acceptance for National Service."

The Court went on to say:

> "If injunction suits were permitted, interminable delays would undoubtedly result while the cases were being processed in the Courts. Such a procedure would interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the Armed Forces with much-needed personnel."

Much the same common sense reasoning is behind the authorities on which the conclusions of law are based that the defendant cannot raise the legal question he does without first showing that he exhausted his administrative remedies. These cases are *Sicurella* v. *United States*, 348 U.S. 385 (1955); *Sunal* v. *Large*, 332 U.S. 174 (1947); *Cox* v. *United States*, 332 U.S. 442 (1947); *Estep* v. *United States*, 327 U.S. 114 (1946); *Gibson* v. *United States*, 329 U.S. 338 (1946); *Billings* v. *Truesdell*, 321 U.S. 542 (1944); *Falbo* v. *United States*, 320 U.S. 549 (1944). See also,

Pickens v. Cox, 282 F 2nd 784 (10 Cir., 1960).

In *Pickens*, the defendant was inducted into the Army in 1953. In 1954 he was tried before a General Court Martial and sentenced to a dishonorable discharge and confinement for ten years. Pickens petitioned for a writ of habeas corpus on the ground that the Army had no jurisdiction over him because he was a sole surviving son at the time of his induction, though he did not inform his local board of that status and had never applied for a release from the military on that account. The Court held the burden was upon the registrant to bring himself within any exemption specified within the Selective Service Act. Where the Act declares that sole surviving sons "shall not be inducted," this phrase does not create a disability in the Selective Service Board nor deny it the power to induct, but merely creates a personal privilege or right to exemption in the individual. "Exemption from military service is a matter of legislative grace. The burden is upon the registrant to claim and establish the right to exemption and the exemption may be waived or abandoned like any other personal privilege." *Ibid.*, p. 785.

As to the contention that the defendant is entitled to the classification IVA as a matter of law, it should be noted that every defense based on improper classification (in a criminal prosecution under the Selective Service Act) is actually a question of law. When the defense is presented and the trial court is asked

to review the administrative board's decision, and the criterion is whether there was a basis in fact for the decision, and not whether the trial court would have made the decision. In *Cox v. The United States, supra,* the Court held that in a criminal prosecution the jury cannot pass on the validity of an administrative order, the question being one for the court, since it is a question of law and not of fact.

An error of law may be a basis for a defense, but only when the defendant has exhausted his administrative remedies. *Sicurella v. The United States, supra.*

Defendant cites *Estep* in support of his position, but the Court finds this case within the facts of *Falbo* and *Billings*, rather than *Estep*.

It remains only to say on the main point, whether this defendant was required to exhaust his administrative remedies that in Selective Service cases the rule is stricter than it is in other areas of the law, and for good reason, since the idea is to get men into the Army as quickly as possible. Where there is still a chance the Service itself may reject them (as by a physical) then there is no reason for judicial review. Hence, cases involving the futility of administrative remedies in other areas, such as labor law, are not deemed applicable.

This is dispositive and makes unnecessary a consideration of the correctness of the defendant's reclassification following the death of his mother. It should suffice to show why the Court

cannot agree with the contentions of the defendant, and why the Court's general finding is that he is guilty.

= = = = = =

JUDGMENT AND COMMITMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal
	)	Indictment
v.	)	Number
	)	11,122
JACK FREDERICK McKART,	)	
	)	
Defendant.	)	

JUDGMENT AND COMMITMENT

On this 22nd day of June, 1967, came the attorney for the government and the defendant appeared in person and represented by Counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty of the offense of Failure to Report for Induction into the Armed Forces of the United States in violation of Section 462, App. 50, U.S.C.

as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is

guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS.

IT IS ADJUDGED that Stay of Execution is Granted pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ David S. Porter
United States District Judge

The Court recommends commitment to:

_____
CLERK

A True Copy. Certified this ___ day of _____.

(Signed) _____ (by) _____
CLERK DEPUTY CLERK

- - - - - -

NOTICE OF APPEAL

(Filed June 28, 1967)

(Title omitted in printing.)

Name and address of appellant:
Jack Frederick McKart

3430 North Elaine Place
Chicago, Illinois 60657
Apt. No. 11

Name and address of appellant's attorney:

Bauer, Swain & Morelli
503 Executive Building
Cincinnati, Ohio 45202

Offense: 50 App. U.S.C., § 462

Defendant was found guilty and sentenced to three years in jail on June 22, 1967.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the above-stated judgment.

Dated June 28, 1967.

/s/Arnold Morelli
Arnold Morelli of
Bauer, Swain & Morelli
Appellant's Attorney

- - - - - -

OPINION OF THE SIXTH CIRCUIT
COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	Appeal from
	)	the United
Plaintiff-	)	States Dis-
Appellee,	)	trict Court
	)	for the
v.	)	Southern
JACK FREDERICK McKART,	)	District of
	)	Ohio, West-
Defendant-	)	ern Division
Appellant.	)	

Decided June 14, 1968.

(Filed June 14, 1968)

Before: PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

PHILLIPS, Circuit Judge. This case arises out of the failure and refusal of Jack Frederick McKart to comply with an order of his local draft board to report for and submit to induction into the Armed Forces of the United States. He was indicted for willfully and knowingly failing and neglecting to perform a duty required of him under the Selective Service Act. 50 U.S.C. App. §462. He waived a jury trial, was found guilty by the District Judge and was sentenced to a prison term of three years.

McKart's indictment and trial were preceded by a long and somewhat complicated history of dealings with his local draft board. He was born February

13, 1943. Shortly after his eighteenth birthday he completed and filed his Selective Service questionnaire. His local board classified him I-A and notified him accordingly on February 26, 1963. McKart made no attempt to appeal his classification.

On March 23, 1964, he was ordered to report for a pre-induction physical examination on April 21. He failed to report. On May 1, 1964, the draft board ordered him to report for induction on May 11. Again he failed to report. Instead he wrote a letter stating his refusal to submit to induction and expressing his total antipathy for the Selective Service System. He said that he did not believe in killing; that the Selective Service System violated his beliefs; and that he therefore refused to have anything to do with it. He objected to conscription as slavery, stating: "I refuse to serve this country armed, and I refuse to serve it unarmed by doing alternative service."

The draft board replied by furnishing McKart the special form for conscientious objector and suggesting that he complete the form and return it. The board also stated in its letter that McKart's original questionnaire had indicated that he was the sole surviving son of a family of which one or more members were killed in action or died in the line of duty, and asked for further information. On May 20, 1964, McKart returned the blank form to the board making it clear that he did not wish to become classified as a conscientious objector, saying: "I simply no longer want to have anything to do with the Selective Service System." At the conclusion of this letter he

stated:

> "If I indicated that I was a 'Sole Surviving Son' when I filled out your forms around my eighteenth birthday; then I made a mistake. I do not even have any brothers and sisters. But my father was killed in the Second World War. I do not have the specific information you asked for."

Although McKart did nothing to claim an exemption as a sole surviving son, the draft board on its own initiative cancelled his induction orders and classified him IV-A. From July 27, 1964, until February 14, 1966, McKart remained in the IV-A classification.

Early in 1966 the board learned of the death of McKart's mother. His classification was changed from IV-A to I-A. When McKart was informed of this reclassification, he made no effort to appeal. Subsequently he was ordered to report for a physical examination on March 17, 1966, and for induction on April 21, 1966. He failed to comply with either of these orders.

At the trial McKart attempted to defend his refusal to report for induction on the ground that he still is entitled to a IV-A classification as a sole surviving son under 50 U.S.C. App. § 456(o). In a well-reasoned memorandum opinion, District Judge David S. Porter held that the failure of McKart to exhaust his administrative remedies within the Selective Service System barred him from raising the validity of his classification as a defense in the criminal proceeding. Judge Porter said:

"Of course, he had not exhausted his administrative remedies. He has simply, from the outset, not had anything to do with the Selective Service System.

* * * * * * * * *

"...The fact of the matter is, however, he did not claim the exemption he now seeks. The draft board gave it to him. He simply rejected the whole idea of the draft..."

On appeal McKart's theory is that a Selective Service registrant is not required to exhaust his administrative remedies when the issue of classification is purely one of law and the position of the Selective Service is so well established that an appeal would be futile.

The issue before us is this: When a Selective Service registrant who has not appealed his classification through the Selective Service prodedures is tried for failure to submit to induction into the Armed Forces, may the registrant raise the defense, upon wholly undisputed facts, that he was wrongfully classified in violation of statute? We answer this question in the negative and affirm the conviction.

In *Falbo v. United States*, 320 U.S. 549, the defendant, a conscientious objector, was tried for willful failure to report for assignment to work of national importance. Falbo defended on the ground that he was entitled to a statutory exemption from all forms of national service. The defendant Falbo challenged the order of his local board before he had exhausted his administrative remedies. The Supreme Court held that Falbo could

not raise this defense. After the decision in *Falbo*, many courts held that, even after exhaustion of administrative remedies, a registrant could not defend a criminal prosecution on the ground that the board lacked jurisdiction to impose the classification. Indeed, most courts held that judicial review of an erroneous classification could be had only in a habeas corpus proceeding after induction.

In *Estep v. United States*, 327 U.S. 114, the Supreme Court held that the defense of an invalid classification may be raised in a criminal prosecution where the registrant has exhausted all administrative remedies, reported for induction, was accepted, but refused to submit to induction. In *Estep* the Court emphasized that the defendant in *Falbo* had not exhausted his administrative remedies:

> *"Falbo v. United States, supra*, does not preclude such a defense in the present cases. In the Falbo case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." 327 U.S. at 123.

The requirement that judicial review of a registrant's classification must await both the full exhaustion of administrative remedies and acceptance for induction is founded on the policy of mobilizing national manpower in the shortest practicable period. *Falbo v.*

United States, *supra*, 320 U.S. 549, 554. Until the registrant reports and iss accepted for induction there is always the possibility that he may be rejected because of his physical condition or perhaps an erroneous classification may be changed. In *United States v. Irons*, 369 F2d 557, 558-59 (6th Cir.), Judge Mathes said:

> "Not only did appellant spurn all administrative remedies available to him, including appeal [cf. *Maddox v. United States*, 264 F 2d 243 (6th Cir. 1959)[; he also refused to report for, or submit to a physical examination. Conscientious objectors are not excused from a physical examination. Indeed, no registrant is, and for good reason. [See Selective Service Regs. § 1628.11, 32 C.F.R. § 1628.11 (1965 Supp.)] Even if improperly classified I-A, there remains the possibility, unfortunately all too great in these times, that he will fail the physical examination and be reclassified as IV F. Where that is the result, all constitutional and other problems incident to I-A clasiification disappear of course, *eo instanti*. [See: *Falbo v. United States*, 320 U.S. 549, 553, 64 S. Ct. 346, 88 L.Ed. 305 (1944); *Moore v. United States*, 302 F. 2d 929 (9th Cir. 1962); *United States v. Balogh*, 160 F2d 999 (2nd Cir. 1947).]
>
> "The same policy requires every registrant to report for induction as ordered, even though he may have valid legal grounds for refusing to submit to induction. [Cf.: *Estep v. United States*, *supra*, 327 U.S. 114, 66 S.Ct. 423; *Williams v. United States*, 203 F. 2d, 85, 88 (9th Cir. 1953).]"

Accord, *Moore v. United States*, 302 F. 2d 929 (9th Cir.); *Breen v. Selective Service Board*, --- F. Supp. ---, 36 U.S.L.W. 2597 (D. Conn.).

In support of the view that the administrative remedies need not be exhausted before the validity of a classification is subject to judicial review, appellant relies on the cases of *Wills v. United States*, 384 F.2d 943 (9th Cir.), cert. denied --- U.S. ---; and *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (2d Cir.).

In *Wills* a registrant was permitted in a criminal proceeding to attack his reclassification without first exhausting his remedies of appeal within the Selective Service System. The local draft board did not mail the registrant his notice of delinquency until long after the expiration of the ten day period for appeal from his subsequent reclassification. The reclassification was found to be not in accordance with the procedure contemplated by the regulations. The Ninth Circuit held that "Knowledge of his delinquency status and impending induction would thus be relevant to appellant's decision whether to appeal, and the board's failure to disclose this fact at the proper time cannot be said to be without consequence to that decision."

In *Wolff* two college students were reclassified from II-S to I-A because they participated at the offices af a Selective Service board in a protest against American involvement in Vietnam. The two students sought to enjoin their local board from reclassifying them. In approving the injunction against the

board, the Second Circuit summarized the basis of its action as follows:

> "The two local boards did act without jurisdiction, the record shows that attempts to secure relief within the Selective Service System would be futile, and the threat to First Amendment rights is of such immediate and irreparable consequence not simply to these students but to others as to require prompt action by the courts to avoid an erosion of these precious constitutional rights. Under this combination of circumstances an injunction could properly issue." 372 F.2d at 820.

Relying upon the rationale of *Dombrowski v. Pfister*, 380 U.S. 479, the Court held that injunctive relief prior to the exhaustion of administrative remedies was warranted because the effect of the reclassification was to curtail immediately the exercise of the First Amendment rights.

It is apparent that the principles applied in *Wills* and *Wolff* are inapplicable to the present case. In making his decision whether to appeal McKart was neither stifled nor misled by the action of his board. Nor does McKart purport to show that his classification by the board was undertaken as an attempt to curtail the exercise of his freedom of speech or any other Constitutional right.

We do not pass upon the question as to whether McKart would have been entitled to a IV-A classification under 50 U.S.C. § 456(o) if he had exhausted his admini-

strative remedies.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting: Regretfully I cannot agree with the conclusion of my brethren in this case. It is clear that the Defendant had every intention to violate the Selective Service Act, but the fact is that he had no duty under any "directions made pursuant to" the Act that he could be guilty of failing to perform.

Defendant was indicted and tried for failing "to comply with an order of his local board to report for and submit to induction..." Section 456(o) of Title 50, App., provides that "...the sole surviving son of such family /the father of which was killed in action/ *shall not* be inducted..." (emphasis added). The local board recognized at one time that the Defendant came under this exemption. When the Defendant's mother died, the board decided that the exemption no longer applied because, in their opinion there was no family left. In my view, that decision was contrary to the clear wording of the statute and to the clear intent of Congress in providing for the exemption. Hence, I conclude that the board's order of induction was not "pursuant to" the Act but in contravention of the Act. Therefore, I can only conclude that regardless of how much he tried, and perhaps even wanted, to violate the Act, the Defendant was not guilty of the offense for which he was indicted and tried.

This is not a case where the existence of the exemption depends upon the board's first making a factual determination.

Here the board had already determined that the Defendant was entitled to the exemption; the termination of that exemption resulted from the board's erroneous interpretation of the law. I feel, therefore, that application of the doctrine of exhaustion of administrative remedies is inappropriate in this case.

I would reverse and dismiss the indictment.

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JUDGMENT OF THE APPELLATE COURT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18,194

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK FREDERICK McKART,

Defendant-Appellant.

JUDGMENT

(Filed June 14, 1968)

Before: PHILLIPS, CELEBREZZE and PECK, Circuit Judges.

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the

record from the United States District Court for the Southern District of Ohio and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

= = = = = = =

ORDER GRANTING CERTIORARI

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968
No. 403

JACK FREDERICK McKART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER ALLOWING CERTIORARI. Filed October 28, 1968.

The petition herein for a writ of

certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

NOTICE OF RIGHT TO PERSONAL APPEARANCE AND APPEAL

If this classification is be a local board, you may, within 10 days after the mailing of this notice, file a written request for a personal appearance before the local board (unless this classification has been determined upon such a personal appearance). Following such personal appearance you may file a written notice of appeal from the local board's classification within the applicable period mentioned in the next paragraph after the date of the mailing of the new notice of classification. If you do not wish a personal appearance but do want to appeal your case, you may do so by making such an appeal in writing, within the specicied time.

Appeal from classification by local board may be taken by filing written notice of appeal with local board within one of the following periods after date of mailing of this notice, whichever is applicable: 10 DAYS, if both registrant and local board are located in the continental United States; 30 DAYS, if registrant is located in the continental United States and local board is located in the State of Alaska, the State of Hawaii, or a possession of the United States; 30 DAYS, if registrant is located in the State of Alaska, the State of Hawaii, or a possession of the United States and local board is located in another State of possession or in the District of Columbia; 30 DAYS, if the registrant is located in Canada, Cuba or Mexico; 60 DAYS, if registrant is locat-

ed in any other foreign country. If the appeal involves a claim for occupational deferment, you may file with the local board a written request that the appeal be submitted to the appeal board having jurisdiction over the area in which your principal place of employment or residence is located.

If an appeal has been taken, and one or more members of the appeal board dissented from such classification, you may file a written notice of appeal to the President with your local board within 10 DAYS after the mailing of this notice.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon receipt.

FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD.

SSS Form 110 (Rev. 5-25-67)
All other forms are obsolete.

(Printed on the reverse side of Notice of Classification; approximate size, 3½ inches by 2¾ inches).

(Plaintiff's Exhibit 1)
June 24, 1966
(Selective Service System Letterhead)

In reply refer to: 5-8q

Local Board No. 9
Butler County
Hamilton, Ohio

Subject: McKART, Jack
Frederick SS No. 33-
9-43-86

Gentlemen:

We requested review of this case at National Headquarters for their opinion as to whether or not this registrant may qualify as a sole surviving son. We are advised that inasmuch as there is no family, it is not believed that the registrant would qualify for sole surviving son status.

We have forwarded Delinquent Registrant Report (SSS Form 301), provided by your local board, the United States Attorney. Please enter a record of mailing this form on the Classification Questionnaire.

The cover sheet is returned, please acknowledge receipt.

For the state Director

/s/Sinclair Russell,Jr.
SINCLAIR RUSSELL, JR.
Lt. Colonel, USAF
Chief, Field Division

Enclosure - Cover Sheet

Plaintiff's Exhibit 1
(Selective Service System Letterhead)

State Director of Selective Service
34 North High Street
Columbus, Ohio

Subject: Jack
Frederick McKart
SS No. 33-9-43-86
Your File: 5-8f

Dear Colonel Clouse:

Attached is the registrant's Selective Service file that was received with your letter of 10 May 1966.

Inasmuch as there is no family, it is not believed that he qualifies for sole surviving son status.

In determining whether any registrant is a sole surviving son, an official statement of service and a death report, together with a chronology of the family happenings, beginning with the marriage of the parents, help to remove assumptions that otherwise have to be made.

For the Director

/s/ Kenneth S. Goodrich
KENNETH S. GOODRICH
Captain, USNR
Chief, Manpower
Division

Attach.

(Plaintiff's Exhibit 1)

May 10, 1966
(Selective Service System Letterhead)

In reply refer to:
5-8f

Director Selective Service System
1724 "F" Street, N.W.
Washington, D.C.

Subject: McKART, ack
Frederick
SS No. 33-9-
43-86

Dear General Hershey:

This registrant states that he had no brothers or sisters, and information is entered in the Cover Sheet verifying that his father died while in service in W.W.II of wounds received in combat. Information is also furnished confirming the death of the registrant's mother on January 30, 1966. Inasmuch as there is no family unit, a question has arisen as to whether or not this registrant continues to qualify for classifiaction as a Sole Surviving Son.

We are forwarding the Cover Sheet for your review, and will appreciate your advice.

Very truly yours,

R.E. C OUSE
Colonel, AUS, (Ret.)
The State Director

Enclosure: Cover Sheet
66

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 403

JACK FREDERICK MCKART, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 49–58) is reported at 395 F. 2d 906.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1968. Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 13, 1968. The petition was filed on that date, and was granted on October 28, 1968 (393 U.S. 922). The jurisdiction of this Court is rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's failure to appeal from the determination of his local board regarding his classification, or to appear for a physical examination when ordered to do so, precludes him from asserting, in defense to a criminal prosecution for failure to submit to induction, that he was wrongfully classified I–A in violation of the Selective Service Act.[1]

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of willfully and knowingly failing to report for and submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (A. 40–46). On June 22, 1967, petitioner was sentenced to imprisonment for a period of three years (A. 46–47). The court of appeals affirmed his conviction, one judge dissenting (A. 49–58).

The facts of this case are not in dispute. Petitioner, who was born on February 13, 1943, registered with his local Selective Service board on or about his eighteenth birthday, and shortly thereafter completed and filed his classification questionnaire (A. 7). He was classified I–A by his local board on February 25, 1963, and was so notified on February 26, 1963 (A. 4, 7–8). Petitioner made no attempt to appeal his classification

[1] In our view, only the exhaustion issue, and not the substantive issue relating to the proper construction of Section 6(o) of the Selective Service Act (50 U.S.C. App. 456(o))—establishing the so-called "sole surviving son" exemption which petitioner claims—is properly before the Court at this time (see note 10, *infra*).

(A. 8). On March 23, 1964, he was ordered to report for a pre-induction physical examination on April 21, 1964, but failed to do so (A. 4, 9). On May 1, 1964, he was ordered to report for induction on May 11, 1964 (A. 4, 9), but again failed to report as ordered (A. 10).

Instead, on May 10, 1964, petitioner wrote a letter to his local board stating that he refused to report for induction, and indicating that he did not believe in killing, that the Selective Service System violated his beliefs, and that he therefore refused to have anything to do with it (A. 17–18). The board replied by furnishing petitioner the form for claiming conscientious objector status, suggesting that it should be completed and returned (A. 19). In its letter the board also referred to petitioner's indication, in his original questionnaire, that he was the sole surviving son of a family of which one or more members had been killed in action, and requested further information on that subject (*ibid.*).

On May 20, 1964, petitioner returned the blank conscientious objector form to the board stating that he did "not wish to become classified as a conscientious objector" (A. 20). He reiterated his previous position, saying that he "simply no longer want[ed] to have anything to do with the Selective Service System" (*ibid.*). At the conclusion of this letter he stated (A. 23–24):

> If I indicated that I was a "Sole Surviving Son" when I filled out your forms around my 18th birthday, then I made a mistake. I do not even have any brothers or sisters. But my father was killed in the second world war. I

do not have the specific information you ask for.

On June 24, 1964, the local board, by letter, once again requested information from petitioner concerning the details surrounding the death of his father during World War II (A. 24). Petitioner responded by supplying some information in this regard (A. 24–25). Subsequently the board, acting on its own initiative, cancelled his induction order and classified him IV–A (A. 11, 26)—the appropriate classification for one exempted as a "sole surviving son" pursuant to Section 6(o) of the Selective Service Act (50 U.S.C. App. 456(o)). From July 27, 1964, until February 14, 1966, petitioner remained in the IV–A classification.

Early in 1966, the local board learned of the death of petitioner's mother. After having been advised by National Headquarters, through the State Director, that petitioner no longer qualified for a "sole surviving son" exemption (A. 64–66), his classification was changed from IV–A to I–A (A. 12). Petitioner took no steps to appeal this reclassification. He was ordered to report for a physical examination on March 17, 1966, and for induction on April 21, 1966 (A. 13–14, 28, 29). He failed to comply with either of these orders (A. 13–14), having asserted in a letter of April 20, 1966, that "[a]ll I want is to be left alone to live my life as I see fit" (A. 32). His criminal prosecution for violation of 50 U.S.C. App. 462 resulted.

At the trial, petitioner's uncle testified that both of petitioner's maternal grandparents and his paternal grandmother were still alive (A. 15–16). Petitioner,

because of his refusal to have anything to do with the Selective Service System, had not brought these facts to the attention of his local board (see A. 17–18, 20–24, 32).

SUMMARY OF ARGUMENT

Almost 25 years ago this Court established, in *Falbo* v. *United States,* 320 U.S. 549, and *Estep* v. *United States,* 327 U.S. 114, that a Selective Service registrant is required to exhaust his administrative remedies or else he is precluded from maintaining that he was misclassified by his local board in defense to a criminal prosecution for failure to submit to induction. Both this Court and the courts of appeals have repeatedly recognized the continuing vitality of the exhaustion requirement in the Selective Service context. As recently as *Oestereich* v. *Selective Service Board,* No. 46, this Term, decided December 16, 1968, the Court explicitly referred to the exhaustion doctrine of *Falbo* and *Estep* with apparent approval.

That doctrine is a long settled one in administrative law generally, and is grounded on sound policy considerations both philosophical and pragmatic in character. It has particular applicability in the Selective Service context, where both Congress and the President have established an elaborate review machinery for considering claims of misclassification of registrants by local boards. If registrants are allowed to bypass these appellate processes with impunity, a substantial increase in litigation regarding Selective Service classifications might result and the primary function of the System, *i.e.*, the rapid mobilization of manpower during

a national emergency, could be thwarted. The exhaustion doctrine of *Falbo* and *Estep* is in any event not unique to the Selective Service context. This Court has long recognized that the failure to pursue an administrative remedy may preclude a defendant from asserting certain defenses in a subsequent criminal prosecution arising out of the same matter. *E.g., Yakus* v. *United States,* 321 U.S. 414, 431–448.

Petitioner's contention that the exhaustion requirement is inapplicable to the particular facts of the instant case is unpersuasive. It seems clear that the taking of administrative appeals would not have been a futile formality here, since the proper construction of Section 6(o) of the Selective Service Act, which provides for the sole surviving son exemption that petitioner claims, is concededly a question of first impression on which the National Selective Service Appeal Board might well have disagreed with the position of the Director. Moreover, the question involved is not solely one of law or statutory interpretation. Since the purpose of the exemption claimed is subject to a variety of possible interpretations, there could well have been issues of fact which might, upon administrative review, have been found determinative. In any event, if the issue is viewed solely as one of law, it is the kind of legal question which the appropriate administrative agency should be given an opportunity to pass upon in the first instance.

Petitioner is also precluded from attacking his reclassification from IV–A to I–A upon the death of his mother because his failure to compete the ad-

ministrative processing for induction by refusing to comply with two separate orders to report for pre-induction physical examinations. That requirement, while closely related to the exhaustion doctrine, is a distinct principle grounded on somewhat different considerations. Under this Court's decision in *Falbo*, petitioner was required to complete the administrative processing by taking the ordered physicals, which might well have resulted in his rejection for service. No registrant, whatever his classification, is entitled to ignore an order to report for a pre-induction physical, and petitioner could have been prosecuted for this violation without regard to the propriety of his reclassification. His refusal to report for a physical examination when ordered to do so thus provides a separate and sufficient ground for barring his assertion of a defense of misclassification in the instant criminal case.

ARGUMENT

PETITIONER'S DISREGARD OF ESTABLISHED ADMINISTRATIVE PROCESSES PRECLUDED HIM FROM ASSERTING A CLAIM OF MISCLASSIFICATION AS A DEFENSE TO HIS CRIMINAL PROSECUTION FOR VIOLATION OF THE SELECTIVE SERVICE ACT

Petitioner's failure to pursue and exhaust his administrative remedies in the instant case was not, as the facts plainly show (see *supra*, pp. 2–4), the result of inadvertence, ignorance or mistake. Rather, the issue presented here is whether a Selective Service registrant who deliberately and flagrantly refused to appeal the classification given him by his local board through the review processes established by

Congress and the President within the Selective Service System, and who failed to appear for a physical examination prior to induction when ordered to do so, may nonetheless assert the defense of misclassification in a subsequent criminal prosecution for refusing to submit to induction. As the district court found and petitioner concedes, not only did he intentionally refuse to exhaust his administrative remedies; he simply refused to have anything to do with the Selective Service System at all (see A. 42). Under these circumstances, to permit petitioner to attack his classification when prosecuted for willful failure to obey his board's order to report for induction would be to minimize to the point of ineffectiveness the elaborate appellate machinery existing within the Selective Service System and established by both the President and Congress.[2]

[2] The pertinent provisions of the statute and the regulations which establish this administrative review machinery include, *inter alia*, Sections 10(b)(2) and 10(b)(3) of the Selective Service Act (50 U.S.C. App. 460(b)(2) and (3)), as amended, which contain general provisions relating to State Directors, State Appeal Boards, and review by the President or his delegate (see 50 U.S.C. App. 460(c)), and a number of sections of the Selective Service System regulations, including 32 C.F.R. 1604.6 (creating and prescribing the duties of the National Selective Service Appeal Board), 32 C.F.R. 1604.21 *et seq.* (relating to the organization and composition of State Appeal Boards), 32 C.F.R. 1604.71 (providing for the appointment and prescribing the duties of government appeal agents), 32 C.F.R. 1624.1 *et seq.* (relating to a registrant's appearance before his local board), 32 C.F.R. 1625.1 *et seq.* (providing for the reopening and reconsideration of a registrant's classification by his local board), and, most particularly, 32 C.F.R. 1626.1 *et seq.*, 1627.1 *et seq.*, and 1628.1 *et seq.*, which elaborately provide, respectively, for appeals to State Appeal Boards, appeals to the President (whose authority is exercised by the National Appeal Board), and physical examinations of registrants prior

If petitioner were to prevail here, other registrants would be encouraged to bypass these administrative processes and the result would be a predictable increase in the volume of such litigation and a potentially serious impairment of the primary function of the Selective Service System, *i.e.*, the rapid mobilization of manpower in times of national emergency. There are 4,085 local draft boards and nearly 20,000,000 men who are within the current age limits of liability for training and service in the Armed Forces of the United States. *Semi-Annual Report of the Director of Selective Service for the Period July 1 to December 31, 1967*, p. 5. As the Third Circuit, sitting *en banc*, said in *United States* v. *Palmer*, 223 F. 2d 893, 896, certiorari denied, 350 U.S. 873:

> * * * [A] sympathetic Congress, desirous to afford a maximum of freedom of conscience, has provided for complete exemption from service for some people and partial exemption for others. It has also provided for a rather elaborate machinery for appeal to make sure that mistakes of local boards do not result in a failure to give any registrant what is due him under the law. There is a method prescribed for handling all these claims for exemption in an orderly way. If rules must be laid down for

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to being ordered to report for induction, and the whole panoply of procedures relating to these matters.

It should be noted that the standard Notice of Classification (SSS Form 110) provided to all registrants upon their classification or reclassification (see 32 C.F.R. § 1623.4) contains a detailed explanation of the registrant's right to take an administrative appeal (see A. 62–63), including information regarding both the timing and manner of appealing a classification to both the State and National Appeal Boards. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 37[illegible]

> the handling of court business, as they are, and the proceedings of administrative bodies, as they are, there is even greater reason for the establishment of orderly procedure with nearly four thousand volunteer boards handling the cases of more than fifteen million young men.

Petitioner, who elected to ignore this carefully constructed system altogether, is in no position to assert, in defense of his deliberate refusal to comply with the orders of his local board, that the board erred in classifying him. The instant case is unlike either *Wolff* v. *Selective Service Board, No. 16,* 372 F. 2d 817 (C.A. 2) or *Oestereich* v. *Selective Service Board,* No. 46, this Term, decided December 16, 1968, where individuals who claimed that their local boards had improperly reclassified them because of activities in which they had engaged sought the aid of the courts, long before the stage of criminal prosecution was reached. Here petitioner did nothing. He did not even notify his local board that he regarded his classification as incorrect. He took no steps to have any claimed error corrected on administrative appeal. He did not, as did the registrants in *Wolff* or *Oestereich,* attempt to preclude the possibility of criminal prosecution by seeking a pre-induction determination of the validity of his classification from the courts. He made no affirmative attempt of any kind to obtain the classification to which he now says he was entitled from the Selective Service System. He simply sought to assert, in defense to the criminal prosecution which ultimately ensued, a claim that the board, whose orders he ignored, should not have classified him as it did. His own prolonged and purposeful inaction, we sub-

mit, was properly held to preclude him from making such a contention at such a late stage.[3]

A. PETITIONER'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES PREVENTED HIM FROM CLAIMING THAT HE WAS IMPROPERLY CLASSIFIED

1. In *Estep* v. *United States*, 327 U.S. 114, 123, this Court held that a Selective Service registrant must have "pursued [his] administrative remedies to the end" before he can assert the defense of misclassification in a criminal prosecution for refusing to submit to induction into the Armed Forces.[4] That holding

[3] It is interesting to note that a recent law review comment which proposes statutory expansion of the right to judicial review of Selective Service classifications would not extend the right of judicial review of a classification to a registrant who deliberately or wantonly ignores possible remedies within the system. Note, *Judicial Review of Selective Service Action: A Need for Reform*, 56 Calif. L. Rev. 448, 463 (1968). That article states: "When the United States Attorney prosecutes a registrant for refusing to submit to induction, the registrant should be permitted to assert the defense of misclassification or unfairness unless he has deliberately or wantonly failed to exhaust his administrative remedies. Because the registrant faces a possible jail sentence, the courts should review the Selective Service action for reversible error to ensure that the registrant is not unjustly convicted of a federal crime. This would not confound any policies underlying the exhaustion doctrine because the courts would not review a classification when the registrant has deliberately or wantonly ignored possible remedies within the system."

[4] *Estep* further held that the statutory prescription that decisions of Selective Service boards "shall be final" at each administrative level was not intended wholly to prohibit post-induction judicial review of Selective Service classifications, but simply to reflect a congressional intent to give administrative action in the Selective Service context a more limited scope of review than ordinarily obtains (327 U.S. at 122). See 4 Davis, *Administrative Law Treatise*, Sec. 28.12 (1958). Under that view, a classification could be invalidated, when challenged in

confirmed and applied the Court's earlier decision in *Falbo* v. *United States*, 320 U.S. 549, where the assertion of such a defense was disallowed because of the registrant's failure to take all of the steps prescribed in the administrative processes. Since the decision in *Estep*, the courts of appeals have uniformly held that, except in extremely rare cases involving exceptional circumstances,* the disregard of administrative appellate processes prevents a defendant from challenging his classification in the courts. See, *e.g.*—among the more recent decisions—*Dunn* v. *United States*, 383 F. 2d 357 (C.A. 1), certiorari denied, 390 U.S. 982; *Kidd* v. *United States*, 386 F. 2d 422 (C.A. 10); *Noland* v. *United States*, 380 F. 2d 1016 (C.A. 10), certiorari denied, 389 U.S. 945; *Edwards* v. *Unit-*

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defense to a criminal prosecution, only where "no basis in fact" therefore existed (327 U.S. at 122–123). In Section 10(b)(3) of the Act, as amended in 1967, this standard for post-induction judicial review is, it should be noted, explicitly prescribed (50 U.S.C. App. 460(b)(3)).

* For example, in *Donato* v. *United States*, 302 F. 2d 469, 470 (C.A. 9), certiorari denied, 374 U.S. 828, the defendant had been summoned to firefighting duty during the time specified for an appeal from the classification decision and the appeal period had expired when he returned from the firefighting mission. Petitioner relies in his brief (pp. 9, 13) on *Glover* v. *United States*, 286 F. 2d 84 (C.A. 8) and *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908. In *Glover*, however, the appellant had taken an administrative appeal from a prior classification notice and lost, but failed to appeal from his fifth and final notice of classification. The court excused this "procedural irregularity." In *Wills* the court of appeals found that the local board did not mail the registrant his notice of delinquency until long after the expiration of the period for appeal from his reclassification. The court found that this error by the local board excused petitioner's failure to exhaust administrative remedies. None of these unusual circumstances is present here. Accordingly, both cases are distinguishable and neither case supports petitioner.

ed States, 395 F. 2d 453 (C.A. 9), certiorari denied, 393 U.S. 845; *United States* v. *Kurki*, 384 F. 2d 905, 907 (C.A. 7), certiorari denied, 390 U.S. 926.

Decisions of this Court as well have repeatedly given explicit recognition to the continuing vitality of the exhaustion requirement as established in *Falbo* and *Estep*. See, *e.g.*, *Billings* v. *Truesdell*, 321 U.S. 542, 558; *Gibson* v. *United States*, 329 U.S. 338, 349–350; *Sunal* v. *Large*, 332 U.S. 174, 176; *Cox* v. *United States*, 332 U.S. 442, 445, 448; *Witmer* v. *United States*, 348 U.S. 375, 377. Indeed, this Court's recent opinion in *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968, makes specific reference to the holding in *Falbo* that "a registrant could not challenge his classification without first exhausting his administrative remedies by reporting, and being accepted, for induction" (slip op., p. 3, n. 5), and to the fact that the registrants involved in *Estep*—where alleged misclassification was allowed to be asserted in defense to a criminal prosecution—"had exhausted their administrative remedies by reporting, and being accepted, for service, before then refusing to submit to induction" (*ibid.*).[6] Similarly, in *Clark*

[6] *Oestereich* of course involved pre-induction judicial review of an allegedly unlawful reclassification of an individual entitled to an express statutory exemption. Where pre-induction suits are permissible, consistent with amended Section 10(b)(3) of the Act, as in the *Oestereich* situation, it is obvious that the exhaustion requirement can only be applied, as a practical matter, to *available* remedies, and thus in a somewhat different manner than in *Falbo* and *Estep*—and the instant case—all of which involved criminal prosecutions after refusals to submit to induction. It is significant, however, that the Court in *Oestereich* expressly noted that the registrant there "took an administrative appeal and lost" (slip op., p. 2). In this regard, see also

v. *Gabriel*, No. 572, this Term, decided December 16, 1968, both *Falbo* and *Estep* were cited by the Court with apparent approval (slip op., p. 3).[7]

The requirement that an individual must exhaust his administrative remedies before requesting the judiciary to set aside an administrative determination which he thinks erroneous is, of course, a "long settled rule" of administrative law. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–52; *Lichter* v. *United States*, 334 U.S. 742, 791–792; Jaffe, *Judicial Control of Administrative Action*, pp. 424–426, 450–454 (1965).[8] The underlying considerations range from the philosophical to the pragmatic. The philosophical argument for this rule has been succinctly stated by Professor Jaffe as follows (*id.* at 425):

> Under the Anglo-American conception, administrative agencies are distinct entities; they are not a part of the judicial system. Judicial control comes in from the outside. The agency

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Mr. Justice Harlan's concurring opinion (slip op., p. 7, n. 7), which stated that "a registrant making such a claim [of a statute's or regulation's invalidity] may [not] come into court before he has exhausted his administrative appeals, for the System may decide in his favor on other grounds, obviating the need for further review," but pointed out that "[p]etitioner here has exhausted available remedies" (*ibid.*).

[7] In *Gabriel* the registrant was denied pre-induction review of his classification, despite his exhaustion of available administrative remedies, because of the application of Section 10(b)(3) of the Act.

[8] Indeed, in *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U.S. 209, the Court referred to the exhaustion requirement declared in the *Myers* case as an "abiding and fundamental principle" of our jurisprudence (*id.* at 222). Cf. 3 Davis, *Administrative Law Treatise*, Sec. 20.01 *et seq.* (1958).

> is either within the Executive or, under *Humphrey's Executor*, "independent." The Judiciary will not lightly interfere with a job given to the Executive until it is clear that the Executive has exceeded its mandate. The exhaustion doctrine is, therefore, an expression of executive and administrative autonomy. * * *

The primary pragmatic consideration underlying the exhaustion doctrine is that of decreasing the volume of litigation in the courts by allowing administrative agencies to correct their errors through their own internal review processes. Cf. *United States* v. *Ruzicka*, 329 U.S. 287, 292–293; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767. If exhaustion were not required, the federal district courts might well come to replace the Selective Service appeal boards as those bodies primarily responsible for reviewing local draft board decisions. The unnecessary increase in the burden on the courts which could result is suggested by a consideration of the statistics relating to the volume of administrative appeals within the System itself. In fiscal year 1965, there were 9,741 such appeals; in fiscal 1966, 49,718 appeals; and in fiscal 1967, 119,167.* There was a similar proportional increase in the number of appeals from

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*The Selective Service System does not keep statistics on a national basis with respect to how many registrants are successful in having their classifications changed on appeal. However, the System has informed us that in fiscal year 1968 in the District of Columbia there were 270 administrative appeals and decisions favoring the registrant were rendered in 150 of these cases. Thus, 56 percent of the appeals taken resulted in the registrant's succeeding in obtaining a reclassification from the appeal board.

decisions of the various appeal boards to the National Appeal Board which acts on behalf of the President. In fiscal year 1965, there were only 163 such appeals; in fiscal 1966, 795, and in fiscal 1967, 2,175. *Semi-Annual Report of the Director of Selective Service for the Period July 1 to December 31, 1967*, p. 10.

Congress and the President have established this elaborate review machinery for the purpose of ensuring, insofar as possible, that errors in classification are corrected internally within the System, without any occasion for recourse to the courts. If all the points which might be raised in the course of the review processes remain available for a registrant to assert in defense to a criminal prosecution for violation of the Act, regardless of whether he pursues these processes, there is little incentive for a registrant to exhaust his administrative remedies. The more cautious, to be sure, would continue to test their claims administratively without risking criminal sanctions. But, predictably, many would simply sit back, as did petitioner here, and do nothing about challenging their classification until a prosecution was brought. Then, without the gloss of administrative review—which in many cases results in an overturning of the decision reviewed (see *infra*, pp. 23–24)—they would seek to obtain review, *ab initio*, by a court. If every registrant who thought he was misclassified by his local board could arbitrarily decide to ignore the appellate processes provided him within the Selective Service System and wait to assert the alleged misclassification in defense to a criminal prosecution, a substantial increase in the volume of such litigation in the federal courts might well ensue.

Moreover, if the established administrative review machinery can be bypassed with impunity, the primary function of the Selective Service System, *i.e.*, the rapid mobilization of manpower in times of national emergency, could be thwarted. An individual who has been classified I–A solely by his local draft board would be more likely to resist an order to report for induction and take a chance on asserting the defense of misclassification in his criminal prosecution, if that avenue is open to him, than a registrant who knows that his claim of misclassification has already been rejected by both his local board and either one or two appeal boards. There is no reason to adopt a rule that would encourage such defiance of the System.

In any event, the exhaustion doctrine of *Falbo* and *Estep* is not peculiar to the Selective Service context. This Court has long recognized that the failure to seek an administrative remedy may preclude a defendant from asserting certain defenses in a criminal case arising out of the same matter, even though administrative relief is no longer available. Thus, in *Yakus* v. *United States*, 321 U.S. 414, the defendants who were prosecuted for violating price regulations under the Emergency Price Control Act attempted to raise as a defense the invalidity of the price regulation which they were accused of violating, although the time for an administrative attack on the regulation had passed when the criminal case was brought and there had been no resort to the prescribed administrative review procedure. This Court held that the proposed defense

was properly rejected by the trial court, stating (321 U.S. at 444):

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Just as in *Yakus*, in the Selective Service context it has been "thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation" (321 U.S. at 433). Indeed, the Court in *Yakus* placed specific reliance on its then-recent holding regarding exhaustion in *Falbo* (see 321 U.S. at 446).

Nor are *Yakus* and *Falbo* in any respect unique in requiring exhaustion of administrative remedies to preserve defenses to criminal prosecutions. As the Court in *Yakus* itself pointed out (321 U.S. at 445):

> For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates * * * even though the validity of these rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. * * * It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful * * *

To be sure, in many situations the validity or applicability of a statutory command can only be tested by disobeying and risking criminal sanctions. And of course, where there are no administrative remedies available at any stage, there is no exhaustion requirement which must be satisfied before the validity of such statutory provisions can be challenged in defense to a criminal prosecution. But, where, as here, there are readily available administrative appeals which might be taken, it is not unconscionable to require, as the Court did in *Yakus*, that they be pursued in order to preserve the ability to attack the validity of the underlying provisions judicially in defense to a later criminal prosecution. Certainly, there can be no hesitation to apply that rule to a defendant who was fully aware of the existence of the administrative review machinery but simply chose to ignore—and ultimately sought to bypass—it.

2. Petitioner maintains, however, that application of the doctrine of exhaustion of administrative remedies is inappropriate in the instant case because (1) the issue involved was solely one of law or statutory interpretation, and (2) it would in any event have been a futile formality for him to have appealed his classification within the Selective Service System (Pet. 8–15).

In the latter regard, petitioner points to a letter concerning his classification from the National Headquarters to the State Director in which the opinion is expressed that "[i]nasmuch as there is no family, it is not believed that he qualified for sole surviving son status" (Pet. 8; see A. 65). Parenthetically, it should be noted that petitioner was completely un-

aware of this correspondence at the time he failed to appeal his reclassification as I-A. His willful failure to appeal was based on his refusal to have anything to do with the Selective Service System, and not in any respect because he had reason to believe that an administrative appeal would necessarily be an empty gesture. Beyond this, however, in view of the fact that petitioner concedes that the proper construction of the statutory exemption for sole surviving sons contained in Section 6(o) of the Act (50 U.S.C. App. 456(o)) is a question of first impression (see Pet. 15), his taking of an administrative appeal can hardly be characterized as a futile formality.

The substantive issue which petitioner might have presented in the course of an administrative appeal is in any event not wholly or necessarily one of law. The intended thrust of the sole surviving son exemption is subject to different possible interpretations.[10]

[10] We do not discuss the substantive issue raised by petitioner relating to the proper interpretation of the sole surviving son exemption contained in Section 6(o) of the Act. We recognize that this was one of the stated questions presented in the petition for certiorari, that the Court did not limit its grant to the exhaustion issue, and that petitioner briefs the issue at some length (Pet. Br. 16-20). However, that issue was not reached by either of the courts below, since the district court refused to consider the claim of exemption (see A. 45) and the court of appeals affirmed the judgment of conviction without reaching the exemption question (A. 56-57), both on the ground that petitioner's failure to pursue and exhaust his administrative remedies precluded his assertion of such a claim in defense to his criminal prosecution. In view of this fact, it would seem inappropriate for this Court to reach and resolve that issue, even should it disagree with our position on the exhaustion issue.

The question of how Section 6(o) should be interpreted is a close and difficult one, as to which the rather sparse legis-

If the basic purpose is deemed to be the preservation of a particular lineage, then the fact that petitioner is the last of his father's line would justify the granting of the exemption. If, however, the essential purpose is regarded as sparing the "family" any further grief or permitting the continued presence of the last male member of the "family" to console, comfort and support the remaining members thereof, there could be issues of fact as to what constitutes the "family" within the contemplation of Section 6(o). For instance, at petitioner's trial it was brought out that both of petitioner's maternal grandparents and petitioner's paternal grandmother were still alive, although petitioner never called these facts to the attention of his local draft board. Even at the present

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lative history is singularly unrevealing regarding the congressional intent in situations like petitioner's. Indeed, a consideration of the statutory language, first adopted in 1948 and amended in 1964, and the pertinent legislative history, shows that Congress may have had a variety of purposes in mind, some of which favor petitioner's reading of the section and some of which support the System's interpretation. Moreover, the exhaustion issue is presumably the recurring question of importance which prompted the court to grant review here. This seems confirmed by the granting of certiorari in *DuVernay* v. *United States*, No. 814, this Term (docketed as No. 442 Misc.) on December 9, 1968, in an order specifying that oral argument in that case shall immediately follow that in the instant case. *DuVernay* similarly involves, *inter alia*, the question whether the failure to exhaust administrative remedies precludes the assertion of misclassification as a defense to a criminal prosecution for violation of the Selective Service Act, albeit in a somewhat different context. In light of these considerations, it is our submission that, should the Court conclude that the exhaustion doctrine was improperly applied here, the case should be remanded in order to afford the lower courts an opportunity to consider and decide the statutory construction question.

time we do not know whether petitioner's paternal grandmother had any children other than the son, petitioner's father, whom she lost in World War II. The facts, if known, might have influenced the initial determination of the local board and the decisions of the appeal boards had administrative review been sought.

Even if the construction of the sole surviving son exemption be viewed solely as an issue of law, it is in any event the kind of legal question which the agency charged by Congress with the duty of executing the statute should pass upon in the first instance. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207–208; *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 235–237; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131. Here the situation is unlike that in *Wolff* v. *Selective Service Board No. 16*, 372 F.2d 817, 825 (C.A. 2), where agency policy had been firmly fixed and publicly announced.[11] Nor is it like that in *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562, or *Leedom* v. *Kyne*, 358 U.S. 184, 188, on which petitioner relies to support his contention that where an administrative agency allegedly misconstrues a statute, the exhaustion doctrine is inapplicable. In both of those cases the claims were that the administrative agencies had acted beyond their statutory jurisdiction. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 479–481, in which the Court distin-

[11] The official Selective Service System regulation (32 C.F.R. 1622.40(a)(10)) governing the placing of a sole surviving son in Class IV–A does not shed any light on the scope of the statutory exemption.

guished *Leedom* v. *Kyne*, and stated that the exception created by that case is a narrow one which is not to be extended. Here petitioner was clearly subject to the jurisdiction of the Selective Service System since he was a registrant of the age group which is liable to be called for training and service in the Armed Forces. The informal opinion expressed in a letter from National Headquarters is not necessarily binding on the State Appeal Board, for the State Appeal Board has a duty to consider matters of classification *de novo*. See 32 C.F.R. 1626.26(a); see also *Falbo* v. *United States*, 320 U.S. 549, 555 (concurring opinion of Mr. Justice Rutledge); *DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8).

Moreover, if petitioner had appealed his reclassification, his appeal might have reached the National Selective Service Appeal Board, which is appointed by the President and which exercises the power bestowed upon the Chief Executive by 50 U.S.C. App. 460(b)(3),[12] independent of the Director of Selective Service (see 32 C.F.R. 1604.6(b)). This independence of the

[12] Section 10(c) of the Act (50 U.S.C. App. 460(c)) authorizes the delegation of this review authority by the President, and it is pursuant thereto that the National Appeal Board was established (see 32 C.F.R. 1604.6). It should be noted that an appeal from the State Appeal Board may be taken to the National Appeal Board by the registrant himself where one or more members dissented from the former body's determination as to his classification (32 C.F.R. 1627.3). Where the State Appeal Board is not divided, an appeal to the National Appeal Board may be taken by either the National Director or the State Director when either "deems it to be in the national interest or necessary to avoid an injustice" (32 C.F.R. 1627.1(a)), and such an appeal may be taken at any time (*ibid.*). An appeal to either the State or National Appeal Board, it should be noted, stays the registrant's induction (32 C.F.R. 1626.41, 1627.8).

National Appeal Board from the rest of the System is not only theoretical. The statistics demonstrate that the Board in fact acts independently of the rest of the System. Thus, in the first half of 1968, the National Selective Service Appeal Board adjudicated 1,129 appeals. During this period, 479 appeals were taken by registrants and the Board reversed the determination of the State Appeal Boards 147 times. Of 361 appeals taken by the National Director, the Board affirmed the determination of the State Appeal Boards in 219 of these cases; of 289 appeals taken by State Directors, the Board affirmed the determination of the State Appeal Boards in 146 of these cases.

Thus, in more than half of the cases in which either the National Director or a State Director of Selective Service thought that a State Appeal Board had made an erroneous classification, the National Selective Service Appeal Board, exercising its independent judgment, affirmed the determinations of the State Appeal Board. *Statistical Report for the National Selective Service Appeal Board for the Six-month Period—January 1, 1968, to June 30, 1968.*[13] In view of these statistics, it simply cannot be said that petitioner's pursuance of his administrative appeals would have been demonstrably futile. Thus, contrary to petitioner's contention, nothing in the facts of the instant case take it out of the ordinary rule that the failure to exhaust administrative remedies bars a claim of misclassification as a defense to a criminal prosecution for willful failure to report for induction.[14]

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[13] A copy of the pertinent part of the statistical report is included in the Appendix (*infra*, p. 31).

[14] In our view, the Court's holding in *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968,

B. PETITIONER'S FAILURE TO COMPLETE THE ADMINISTRATIVE PROCESSING BY NOT REPORTING FOR A PRE-INDUCTION PHYSICAL EXAMINATION SIMILARLY PRECLUDED HIM FROM ASSERTING THE DEFENSE OF MISCLASSIFICATION

Petitioner is also precluded from attacking his reclassification in this criminal case because of his failure to complete the administrative processing for induction. Petitioner simply ignored two separate orders to report for a pre-induction physical examination. He also failed to report to the induction center when ordered to do so, at which time he would have received a physical examination prior to being told, if found physically fit, to step forward, the symbolic act which signifies acceptance of induction.

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does not support petitioner's claim that the exhaustion requirement was inapposite here. In *Oestereich* the Court held that a registrant incontestably entitled to a statutory exemption, who is reclassified as a result of alleged engagement in protest activity, can obtain pre-induction judicial review of the validity of his reclassification in a civil action for injunctive relief, despite the general prohibition on such suits contained in amended Section 10(b)(3) of the Act. Had petitioner sought pre-induction review (after having exhausted his administrative appeals, as did Oestereich; see note 6, *supra*), he might well have been held entitled to bring such a suit. Like Oestereich, he claimed an absolute statutory exemption from military training and service, and not simply a deferment conditioned on the survival of a member of his "family", although, unlike *Oestereich*, his claim was not "plain and unequivocal and in no way contested" (slip op., p. 5) (see note 10, *supra*). Compare *Clark* v. *Gabriel*, No. 572, this Term, decided December 16, 1968, and *Boyd* v. *Clark*, No. 490, this Term, decided January 13, 1969. Nonetheless, the fact that petitioner claimed an exemption in no respect relieved him of the obligation to exhaust his available administrative remedies. At whatever stage the courts might properly [illegible] a claim such as that made by petitioner, it can only be [illegible] other available, non-judicial remedies have been pursued.

At the outset it should be noted that the doctrine that a Selective Service registrant must complete his administrative processing in order to be able to assert a defense of misclassification, while closely related to the doctrine of exhaustion of administrative remedies, is a separate and distinct principle based on different pragmatic considerations. That settled doctrine is applicable here, and provides an additional and alternative ground for upholding the judgment below (see A. 53–55).

In *Falbo* v. *United States,* 320 U.S. 549, 553, this Court noted that a registrant may have exhausted his administrative appeals and still be rejected for service as a result of the physical examination which is given at the induction center prior to actual induction. Consequently, this Court held that a registrant who failed to report for such a physical examination had not completed the administrative process and could not assert the defense of misclassification in a prosecution for failing to report for induction.[15] The Court reaffirmed this rule in *Gibson* v. *United States,* 329 U.S. 338, 343–345, which was decided after *Estep,* the decision which clarified *Falbo* (see *supra,* pp. 11–12). The rationale underlying the *Falbo* doctrine has been ex-

[15] Subsequent to *Falbo* the regulations were changed so as to provide, as a general matter, for the giving of pre-induction physicals "before issuance of the order to report for induction, rather than afterward" (*Gibson* v. *United States*, 329 U.S. 338, 347). That basic approach as to the timing of physicals is still utilized (see 32 C.F.R. 1628.10), although a determination is still made at induction center as to whether each registrant is qualified for induction (see 32 C.F.R. 1632.15(e), 1632.16).

plained as follows (*Daniels* v. *United States*, 372 F. 2d 407, 414 (C.A. 9 (*en banc*)):

> * * * [E]ven after administrative remedies have been exhausted, a court will not examine the validity of a classification until the registrant establishes that he has been aggrieved. A registrant is aggrieved only when the selection process is at an end and there is no longer a possibility of rejection as a part of that process. * * *

That rationale is no less pertinent today than it was when *Falbo* was decided.

The chances that petitioner might have been rejected for service in the Armed Forces after a pre-induction physical or after examination at the induction center were hardly remote or insignificant. During the six-month period beginning July 1, 1967, and ending December 31, 1967, according to the Selective Service System, pre-induction physical examinations were given to 435,025 registrants. Of these, 178,718, or 41.1 percent, were found not to be physically qualified for service. During the same period, the local boards delivered 159,772 registrants to induction centers where, after examination or inspection, 24,574, or 15.4 percent, were found not to be qualified for service. *Semi-Annual Report of the Director of Selective Service, supra,* at p. 12. Thus, as the court of appeals stated in *United States* v. *Irons*, 369 F. 2d 557, 558 (C.A. 6):

> Even if improperly classified I–A, there remains the possibility, unfortunately all too great in these times, that he will fail the physical examination and be reclassified as 4–F.

> Where that is the result, all constitutional and other problems incident to I-A classification disappear of course, *eo instanti*.[16]

Moreover, the fact that 15 percent of registrants ordered to report for induction are rejected at the induction center shows that the *Falbo* doctrine has continuing pragmatic validity. It is particularly applicable in a case like this one where petitioner completely ignored all orders of the board, and had not been given a physical examination previously.[17]

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[16] See also *United States* v. *Balogh*, 329 U.S. 692, where this Court, on the authority of *Falbo*, reversed a decision of the court of appeals (157 F. 2d 939) which had held a local board's classification and order to report for induction invalid. On remand the court of appeals sustained the conviction (160 F. 2d 999 (C.A. 2)), and certiorari was denied (331 U.S. 837).

In a recent decision, a panel of the court of appeals for the Ninth Circuit noted the distinction between the completion of administrative processing and the exhaustion of administrative remedies. *Lockhart* v. *United States*, No. 21,311, decided October 23, 1968. In that case the court excused the defendant's failure to take an administrative appeal on the ground that he did not understand his right to appeal. The court expressly found that petitioner had complied with the completion requirement by reporting for induction and refusing to step forward (slip op., pp. 2, 9–10). The government's petition for rehearing *en banc* from the part of the panel decision dealing with exhaustion was granted on November 13, 1968, and the case is still pending in the court of appeals.

[17] *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968, in no way limits the application of the doctrine of the completion of administrative processing in the instant case. In the limited class of situations recognized in that decision where a registrant may proceed by injunctive suit without awaiting the possibility of criminal prosecution, a registrant may legitimately not be required to await an order to report for induction before filing his suit. This is far different from saying that a registrant may do nothing, not even report for a physi-

In this connection it should be noted that no registrant is exempted by statute from complying with an order to report for a pre-induction physical examination. Indeed, the Selective Service System regulations expressly authorize a local board to order a pre-induction physical for an individual who is in a class other than Class I–A, Class I–A–O and Class I–O, if the local board determines that his induction may shortly occur (32 C.F.R. 1628.11(c)). Since a sole surviving son is not statutorily exempt in time of war or national emergency, he could properly be required to report for a physical under this regulation.[18] Petitioner could thus have been prosecuted for failing to report for his physical examination, a duty imposed upon him by the Selective Service Act and regulations (see 32 C.F.R. 1628.16) within the meaning of 50 U.S.C. App. 462, and his claim that he was entitled to a statutory exemption would in no event have constituted a defense. Accordingly, petitioner, who twice willfully refused to report for a pre-induction physical and who never reported to the induction center at all, should at all events be barred from asserting the defense of misclassification in this prosecution because of his failure to complete his administrative processing—however the exhaustion issue, as a general matter, is resolved.

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cal examination, and still claim misclassification as a defense when prosecuted (see note 6, *supra*).

[18] In this regard it should be noted that a sole surviving son can waive his exemption under the statute and volunteer for service in the Armed Forces. *Cf. Pickens* v. *Cox*, 282 F.2d 784 (C.A. 10).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

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FEBRUARY 1969.

APPENDIX

Statistical Report for the National Selective Service Appeal Board for the Six-month Period, January 1, 1968, through June 30, 1968

Total number of appeals received as of June 30, 1968	1,094
Total number of appeals adjudicated	1,129
In Adjudicated Cases:	
Appeals taken by the Director of Selective Service	361
Appeals taken by the State Directors	289
Appeals taken by Split Decisions	479

Disposition of Presidential appeals on which action was taken during the period January 1 through June 30, 1968:

Director:	
Reversed	135
Affirmed	219
No Action	7
Total	361
State Directors:	
Reversed	137
Affirmed	146
No Action	6
Total	289
Split:	
Reversed	147
Affirmed	330
No Action	2
Total	479
Total	1,129

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No. 403

JACK FREDERICK McKART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR JACK FREDERICK McKART

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REPLY BRIEF FOR JACK FREDERICK McKART

QUESTION PRESENTED.

Must a Selective Service registrant futilely exhaust administrative remedies, when his IV-A, sole surviving son, exemption has been terminated upon an erroneous interpretation of the law, in order to be able to challenge the validity of that termination in a criminal proceeding?

ARGUMENT.

(a)

ADMINISTRATIVE REMEDIES CONSTITUTED A FUTILE AND EMPTY FORMALITY.

The Government in its brief (R. Br. pp. 20-22)[1] seeks to interject a factual issue into the substantive question of whether the Petitioner is entitled to classification as a sole surviving son. This position has no support in the record. The National and State Directors determined that the eligibility for the classification was gone with the disappearance of the "family unit" (A. 12, 34-35, 64-66). "Family unit" was defined as being composed of father, mother and children (A. 66). On the basis of this interpretation by Selective Service, the existence of the grandparents was irrelevant[2]: "In determining whether any registrant is a sole surviving son, an official statement of service and a death report, together with a chronology of the family happenings, *beginning with the marriage of the parents,* help to remove assumptions that otherwise have to be made." A., p. 65 (Emphasis added). Therefore, Selective Service had determined, as a matter of law, that the non-existence of a father, mother and sister disqualifies a registrant for exemption as a sole surviving son. The issue is thus only one of statutory construction. The facts about the existence of

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(1) R. Br. refers to Respondent's Brief.

(2) In addition, the Government never raised the matter of the grandparents in its appellate brief in the Sixth Circuit Court of Appeals, and it should not be allowed to do so at this point.

grandparents would have had no influence whatsoever on the local or appeal board.

The Government also argues that the position taken by the National Director was not binding upon the State Appeal Board, which is under a duty to make a classification *de novo* (R. Br. p. 23). This contention flies in the face of the reality of the way in which the State Appeal Boards operate. As Justice Harlan so aptly stated recently:

> "The boards have no power to promulgate regulations, and are not expressly delegated any authority to pass on the validity of regulations or statutes. Such authority cannot readily be inferred, for the composition of the boards, and their administrative procedures, render them wholly unsuitable forums for the adjudication of these matters: local and appeal boards consist of part-time, uncompensated members, chosen ideally to be representative of the registrants' communities; the fact that a registrant may not be represented by counsel in Selective Service proceedings, 32 CFR §1624.1 (b), seems incompatible with the boards' serious consideration of such purely legal claims. Indeed, the denial of counsel has been justified on the ground that the proceedings are nonjudicial. *United States* v. *Sturgis*, 342 F. 2d 328, 332 (1965), cert. denied, 382 U.S. 879; cf. *United States* v. *Capehart*, 141 F. Supp. 708, 719 (1956); affirmed, 237 F. 2d 388 (1957), cert. denied, 352 U.S. 971." *Oestereich* v. *Selective Service Board No. 46*, this Term, decided Dec. 16, 1968, 37 LW 4056.

It is hardly likely that these Boards, composed and functioning in this manner, would take an independent stand on a purely legal question. Since the local board followed the interpretation of the National Director, the State Appeal Board would not do otherwise.

In *Sicurella* v. *United States*, 348 U.S. 385 (1954) this Court recognized that a State Appeal Board would not resolve a purely legal dispute independently, but would rather be controlled by a third party which the Board considered authoritative:

> "The report * * of the Department of Justice to the Appeal Board clearly bases its recommendation on petitioner's willingness to 'fight under some circumstances, namely in defense of his ministry, Kingdom Interests and in defense of his fellow brethren,' and we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground." 340 U.S., at 392.

An even greater influence would obviously be exerted by the National Director.

The Government also contends that Petitioner's appeal might have reached the National Selective Service Board and that the Board is independent of the National Director in fact as well as theory (R. Br. pp. 23-24). This contention is based upon certain statistics regarding decisions made by the National Board, showing disagreement with the determination by the National Director and State Directors in a significant percentage of the cases. This position also suffers from a considerable departure from the reality of what happens in actual practice.

The statistics recited by the Government are not meaningful in the present cause, because they are not refined to show which of the cases involved disagreement with the State and National Directors on purely legal questions and which involved factual disputes. As far as anyone can discern, the instances of disagreement may

be nothing more than disagreement over the resolution of factual issues. Certainly, they do not show any independence of the National Board regarding purely legal questions.

At the same time, the Government implies that an appeal to the National Board is a real possibility, so that use of the appeal process was not "demonstrably futile." (R. Br. p. 24). As the Government acknowledges, an appeal can be taken to the National Board by the registrant himself only if the State Appeal Board has a dissenting vote. The rarity of this occurrence is documented by the statistics, which show that 479 split decisions were decided by the National Board from January 1, 1968, through June 30, 1968, while 119,167 appeals were taken to State Appeal Boards during fiscal 1967 (R. Br. pp. 15, 24). The only other method of having a case brought to the National Board is to have an appeal taken by the State Director or National Director, which was not conceivable in this case, given the legal interpretation of the statute by Selective Service. The possibility of having the appeal reach the National Board may not be "demonstrably futile," but must be considered to be practically futile.

In footnote 10 of its Brief (R. Br. pp. 20-21), the Government states that this cause ought to be returned to the lower courts for a decision on the statutory question, if this Court determines that the exhaustion doctrine was improperly applied here. In light of the fact that neither side has found any decisions on this question, this Court will ultimately have to resolve this issue. This Court has before it now all materials and argument necessary to determine the question. Remanding this matter would be an obvious example of "demonstrable futility."

(b)

THE ISSUE INVOLVED IS PURELY ONE OF LAW OR STATUTORY INTERPRETATION.

The Government contends that petitioner's disregard of, and failure to exhaust, established administrative processes precludes him from asserting a claim that his reclassification and subsequent induction order were in violation of an explicit statutory prohibition. In support of this contention it cites *Falbo* v. *United States*, 320 U.S. 549, and *Estep* v. *United States*, 327 U.S. 114.

As we pointed out in our brief (p. 15) *Falbo* and *Estep* simply do not apply to petitioner's case in that they, together, determined the point in the administrative process to which the registrant had to bring himself in order to challenge the factual basis of his classification. Since both cases involved factual determinations by local boards within the competency and jurisdiction of these boards, they are not applicable to petitioner's case which involves the violation of an explicit statutory prohibition by a local board. Thus, because of the very restricted question presented by petitioner's case, respondent's fears of the imminent collapse of the Selective Service System (R. Br. pp. 8, 9, 10, 15, 16, 17), should petitioner prevail, are unwarranted.

The Government's reliance on other cases to support its position is also misplaced. In *Oestereich* v. *Selective Service Board*, No. 46, this Term, decided December 16, 1968, this court allowed injunctive relief to a registrant whose local board deprived him of this statutory exemption (37 LW 4054). Though Oestereich first appealed administratively (which McKart did not), it would in-

deed be ironic to allow a person's statutory exemption more protection in an injunctive proceeding than it would have in a criminal proceeding.

On page 12 of its brief the Government attempts to distinguish *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9) from petitioner's case by pointing out that a local board mailing error excused exhaustion in that case. However, our reliance on *Wills* is not based on that fact, but rather on what Judge Merrill said in considering defendant's constitutional objections.

> In the first place, appellant's objection to his classification was not addressed to the area of administrative judgment. It did not pose a question upon which courts, bowing to special expertise, would regard the administrative determination as final, save only where basis in fact is lacking. His objection, founded upon a claim of constitutional right, was one on which courts have little reason to defer to administrative determination. The exhaustion rule loses much of its force in this area. Cf., *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817, 825 (2d Cir. 1967). *Wills* v. *United States*, 384 F. 2d 943, 945 (C.A. 9)

This court in *Clark* v. *Gabriel*, No. 572, this Term, decided December 16, 1968, drew a similar distinction between a question of law or statutory right and a question of fact which is committed to administrative expertise for determination (37 LW 3217).

The Government relies on *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52 (R. Br. p. 14) to the effect "that an individual must exhaust his administrative remedies before requesting the judiciary to set aside an administrative determination which he thinks erroneous. . . ." However, in *Myers* the plaintiff sought in-

junctive relief and still had an administrative process, namely, the N. L. R. B., to go back to.[3] Whereas, petitioner has no administrative process that he can now resort to.

The Government then rightly points out in a quotation from Professor Jaffe that "the Judiciary will not lightly interfere with a job given to the Executive until it is clear that the Executive has exceeded its mandate." Jaffe, *Judicial Control of Administrative Action*, p. 425 (1965). (R. Br. pp. 14, 15) The Government further recognizes the validity of this principle of judicial intervention by citing two cases where this court excused exhaustion because the claims were that the administrative agencies had acted beyond their statutory jurisdiction. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562 and *Leedom* v. *Kyne*, 358 U.S. 184, 188 (R. Br. p. 22).

Yet, for some reason or another, the Government doesn't see this principle being applicable to Petitioner's case. However, this is precisely Petitioner's contention, that in reclassifying him I-A and ordering him to report for induction his local board acted beyond its statutory jurisdiction, because Section 456(o) of Title 50, App. specifies that ". . . the sole surviving son of such family (the father of which was killed in action) shall not be inducted. . . ." Thus, even the Government admits

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[3] Davis in his treatise on administrative law points out "that in at least seven cases the Supreme Court itself has passed upon questions of administrative jurisdiction without requiring exhaustion of administrative remedies . . ." (cf. 3 Davis, *Administrative Law Treatise*, Sec. 20.02 fn. 8 *et seq* (1958). And these were cases where injunctive relief was sought and exhaustion excused.

the validity of the principle sought to be applied to petitioner's case.

The Government then cites *Yakus* v. *United States*, 321 U.S. 414, to the effect "that failure to seek an administrative remedy may preclude a defendant from asserting certain defenses in a criminal case arising out of the same matter, even though administrative relief is no longer available." (R. Br. p. 17). However, there are significant differences between *Yakus* and petitioner's case.

In *Yakus* at pp. 429, 430 this court held that:

> The provisions of Section 204 (d), (of the Emergency Price Control Act) conferring upon the Emergency Court of Appeals and this Court "exclusive jurisdiction to determine the validity of any regulation or order," coupled with the provision that "no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation," are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation.

No such exclusive grant of judicial jurisdiction exists under the Selective Service Act. Furthermore, *Yakus* was concerned with the validity of an administrative regulation, whereas petitioner's case involves the violation of an explicit statutory prohibition by the local board, a much more serious matter.

Likewise in *Lichter* v. *United States*, 334 U.S. 742, 791, 792 (R. Br. p. 14) this Court refused to allow petitioners there to raise the issue of excessive profits when they had failed "to resort to the Tax Court in the face of the express statutory provisions made for such administrative relief." In addition to the lack of express

statutory provisions here, petitioner is defending in a criminal proceeding, whereas Lichter was defending in a civil matter. And as Justice Murphy said in his dissent in *Falbo*: "Criminal punishment for disobedience of an arbitrary and invalid order is objectionable regardless of whether the order be interlocutory or final." *Falbo* v. *United States,* 320 U.S. 549, 558.

(c)

PETITIONER'S FAILURE TO REPORT TO TWO PRE-INDUCTION PHYSICAL EXAMINATIONS AND AN INDUCTION PHYSICAL EXAMINATION SHOULD NOT PRECLUDE HIM FROM ASSERTING THE INVALIDITY OF HIS RECLASSIFICATION AND SUBSEQUENT INDUCTION ORDER.

Finally, the Government urges that petitioner be precluded from attacking his reclassification because he failed to report for two pre-induction physical examinations and he failed to report to the induction center where he would have received a physical examination prior to induction (R. Br. p. 25).

First of all the petitioner has not been charged with willful failure to report for a pre-induction physical examination. Thus, that matter is not relevant to the issue in question, namely, the validity of his reclassification and subsequent induction order.

The order for the first pre-induction physical examination, set for April 21, 1964, was cancelled by petitioner's board when they classified him 4-A on July 27, 1964 (A. 4, 26). Since that order no longer exists, it cannot have any effect on the issues here.

As for the second order to report for a p.i.p.e.,[4] set for March 17, 1966, petitioner's file shows that this order was issued only after petitioner was re-classified 1-A on Feb-

[4] "p.i.p.e." hereinafter means pre-induction physical examination.

ruary 14, 1966 (A. 5). This order was issued pursuant to Selective Service regulation 32 C.F.R. 1628.11(b).[5] Had petitioner not been invalidly classified 1-A he never would have been ordered for a p.i.p.e. pursuant to that 1-A classification. Thus, to argue as the Government does, that petitioner's failure to take his p.i.p.e. precludes him from pointing out the invalidity of his re-classification, is to attempt to validate a patently invalid re-classification.

If petitioner's failure to take such an examination can bar his pointing out the invalidity of his re-classification, then it doesn't really matter if his re-classification was valid or invalid, because that re-classification will never be looked at in a court of law. Then, in effect, petitioner is going to jail, not because he was validly re-classified and subsequently disobeyed a valid induction order, but rather, because he simply failed to take a p.i.p.e. as ordered. So, though indicted and convicted for failure to report for induction on April 21, 1966, petitioner is really going to jail for failure to take a p.i.p.e. on March 17, 1966, a crime for which he was neither charged nor convicted.

Any rule of law (here, the exhaustion rule) which leads to such an anomalous and unfair result has to have something wrong with it. And the error of the exhaustion rule here lies in this. If petitioner's re-classification to 1-A was beyond the jurisdiction of his board and, therefore, invalid, it is the central issue before the Court. To attempt to pre-

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[5] 32 C.F.R. 1628.11(b) provides for the issuance of p.i.p.e. orders to registrants classified I-A. The Government argues (R. Br. P-29) that petitioner could have been ordered for a p.i.p.e. pursuant to 32 C.F.R. 1628.11(c) which provides for such examinations for registrants classified other than I-A, I-A-O, or I-O, provided the local board determines their induction may shortly occur. However, there was never any such determination in petitioner's case while he was classified 4-A. And it is quite clear that his being re-classified I-A on February 14, 1966, led to his being ordered for a p.i.p.e. set for March 17, 1966.

vent a consideration of this central issue by citing petitioner's failure to follow procedures consequent upon his invalid re-classification is to turn the nature of causality upside down.

If the local board is responsible for invalidly reclassifying petitioner, then why punish him for not doing what the local board never had any right or power to tell him to do? Why not, instead, hold the local board responsible for doing what they never had any right to do, namely, re-classify petitioner 1-A and order him to report for induction?

As the order to report for a p.i.p.e. was consequent upon an invalid re-classification to 1-A, that order is as invalid as the re-classification itself. The same argument follows for petitioner's failure to take an induction physical examination on April 21, 1966. If petitioner's induction order was invalid, then procedures consequent upon that order, e.g. the induction physical examination, were invalid as well.

The great irony of petitioner's case is that, although he is exempt by law from induction, the Government is attempting to imprison him for failing to take physical examinations whose sole purpose is to determine a registrant's fitness for induction.

Lastly, to argue, as the Government does, (R. Br. p. 27) that petitioner is not "aggrieved" until he has been physically examined misses the point. The petitioner was aggrieved at the point of re-classification, because only then could the local board order him for a physical examination, thus causing him to refuse on the basis of his convictions. Furthermore, being sentenced to prison for three years on the basis of an invalid re-classification and induction order would appear to be a rather severe form of "aggrievement."

CONCLUSION.

For the reasons heretofore set forth, Petitioner prays that the judgment of the District Court be reversed and that the indictment be dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 403.—October Term, 1968.

Jack Frederick McKart, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May 26, 1969.]

Mr. Justice Marshall delivered the opinion of the Court.

Petitioner was indicted for willfully and knowingly failing to report for and submit to induction into the Armed Forces of the United States.[1] At trial, petitioner's only defense was that he should have been exempt from military service because he was the "sole surviving son" of a family whose father had been killed in action while serving in the Armed Forces of the United States.[2] The District Court held that he could not raise

[1] "Any . . . person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . , or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ." Selective Service Act of 1948, c. 625, § 12, 62 Stat. 622, as amended, 50 U. S. C. App. § 462 (Supp. III, 1968).

[2] "Except during the period of a war or a national emergency declared by the Congress after the date of the enactment of the 1964 amendment to this subsection [July 7, 1964], where the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces of the United States, or subsequently died as a result of injuries received or disease incurred during such service, the sole surviving son of such family shall not be inducted for service under the terms of this title . . . unless he volunteers for induction." Selective Service Act of 1948, c. 625 § 6 (*o*), 62 Stat. 613, as amended, 50 U. S. C. App. § 456 (*o*).

that defense because he had failed to exhaust the administrative remedies provided by the Selective Service System. Accordingly, petitioner was convicted and sentenced to three years imprisonment. The Court of Appeals affirmed, with one judge dissenting. *McKart v. United States*, 395 F. 2d 906 (C. A. 6th Cir. 1968). We granted certiorari. 393 U. S. 922 (1968).

I.

The facts are not in dispute. Petitioner registered with his local Selective Service board shortly after his 18th birthday and thereafter completed his classification questionnaire. On that form he indicated that he was "the sole surviving son of a family of which one or more sons or daughters were killed in action . . . . while serving in the Armed Forces of the United States . . . ." On February 25, 1963, petitioner's local board placed him in Class I–A, available for military service; he made no attempt to appeal that classification.[3]

On March 23, 1964, he was ordered to report for a preinduction physical, but failed to do so. He was declared a delinquent and ordered to report for induction on May 11, 1964. He failed to report, but instead wrote a letter to his local board indicating that his moral beliefs prevented him from cooperating with the Selective Service System. The local board replied by sending petitioner the form for claiming conscientious objector

[3] A registrant has the right to appear before his local board to contest his classification or to present new information to the board. 32 CFR §§ 1624.1, 1624.2 (1969). The board then determines whether or not to reconsider the registrant's classification. 32 CFR §§ 1624.2 (c), (d) (1969). Following the local board's decision, the registrant has the right to appeal to the state appeal board. 32 CFR §§ 1624.2 (e), 1625.13 (1969). A further appeal may be taken by the registrant to the National Selective Service Appeal Board only if one or more members of the state appeal board dissents from the board's decision. 32 CFR § 1627.3 (1969).

status. The board also referred to petitioner's indication in his original questionnaire that he was a sole surviving son and requested further information on that subject.

On May 20, 1964, petitioner returned the blank form, stating that he did not wish to be a conscientious objector. In response to the board's request for information about his claim to be a sole surviving son, petitioner indicated that his father had been killed in World War II. The local board, after consulting the State Director, again wrote petitioner requesting more information about his father. Petitioner supplied some of the information. The local board forwarded this information to the State Director, who requested the local board to reopen petitioner's classification.[4] The board canceled his induction order and reclassified him IV–A, the appropriate classification for a registrant exempted as a sole surviving son. Petitioner remained in that classification until February 14, 1966.

Early in 1966, the local board learned of the death of petitioner's mother. After checking with the State Director, the board returned petitioner to Class I–A. The board rested this decision on the theory that a IV–A classification became improper when petitioner's "family unit" ceased to exist on the death of his mother. Petitioner was ordered to report for a preinduction physical. He failed to report and was declared a delinquent and ordered to report for induction. He again failed to report and, after further investigation, his criminal prosecution followed.[5]

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[4] The Selective Service System Regulations require the local board to reopen a registrant's classification upon the written request of the State or National Director. 32 CFR § 1625.3 (a) (1969).

[5] After petitioner failed to report for induction the second time, the State Director confirmed that petitioner's father had been killed in action and then requested advice of the National Director. The latter replied that "[i]nasmuch as there is no family, it is not

II.

We think it clear that petitioner was exempt from military service as a sole surviving son. The sole surviving son exemption originated in the Selective Service Act of 1948, c. 625, § 6 (*o*), 62 Stat. 613. As originally enacted, that section provided exemption for the sole surviving son only "[w]here one or more sons or daughters of a family were killed in action . . . while serving in the armed forces of the United States." In 1964, the section was amended to extend the exemption to sole surviving sons whose fathers were killed in action. 78 Stat. 296. The section now reads in relevant part as follows:

> "[W]here the father or one or more sons or daughters of a family were killed in action or died in line of duty while serving in the Armed Forces . . . the sole surviving son of such family shall not be inducted for service . . . ." 50 U. S. C. App. § 456 (*o*).

There is no question that petitioner was entitled to an exemption before the death of his mother. The issue is whether her death, and the end of the immediate "family unit," ended that exemption.

We have found no cases discussing this aspect of § 6 (*o*).[6] The applicable Selective Service System Regulation, 32 CFR § 1622.40 (a) (10) (1969), merely repeats the language of the statute. The system's administrative interpretations have not been uniform,[7] although in the

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believed that [petitioner] qualifies for sole surviving son status." This information was then communicated to the local board and the case referred to the local United States Attorney. Petitioner's indictment followed.

[6] Cf. *Pickens* v. *Cox*, 282 F. 2d 784 (C. A. 10th Cir. 1960).

[7] Shortly after the 1964 amendment, the Selective Service System took the position that a sole surviving son exemption would not be affected by any change in the status of the family, other than the

present case the National Director took the position that "[i]nasmuch as there is no family, it is not believed that [petitioner] qualifies for sole surviving son status." We must, therefore, decide what is essentially a question of first impression. Our examination of the language and legislative history of § 6 (*o*) indicates that the Selective Service System's interpretation fails to effectuate fully the purposes Congress had in mind in providing the exemption.

The language of the statute provides only three conditions, two explicit and one implicit, upon which the exemption should terminate. The registrant may volunteer for service, a national emergency or war may be declared, or, implicitly, the registrant may cease to be the sole surviving son by the birth of a brother. The section says nothing about the continuing existence of a family unit, even though other provisions of the Selective Service laws make similar conditions explicit in other contexts.[8]

The argument for conditioning the exemption upon the continued existence of a family unit is based not upon the language or structure of the statute, but upon

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birth of a full brother. Selective Service System Operations Bulletin No. 263 (August 14, 1964). That position was later rescinded and the System has issued no further instructions concerning § 6(*o*).

[8] Section 6 (h) of the Military Selective Service Act of 1967, 81 Stat. 103, authorizes the President to provide for the deferment of "persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes." Section 6 (h) of the Selective Service Act of 1948, 62 Stat. 612, was to the same general effect.

Had Congress wished to condition the exemption on the existence of a family unit, it would also seem logical for it to have defined that "family unit." For example, the trial in the present case disclosed that both of petitioner's maternal grandparents and his paternal grandmother were still living. Nothing in the statute indicates whether these relatives should be considered part of the "family."

certain references in the legislative history. These comments indicate that one purpose of the exemption was to provide "solace and consolation" to the remaining family members by guaranteeing the presence of the sole surviving son. See S. Rep. No. 1119, 88th Cong., 2d Sess., 3 (1964); Hearings before Subcommittee No. 1 of the House Committee on Armed Services on H. R. 2664, 88th Cong., 1st Sess., 3442–3443 (1963). When there is no one left to comfort, it is argued, the sole surviving son may be drafted. However, our examination of the sparse legislative history discloses that Congress had not one but several purposes in mind in providing the exemption, only some of which depend upon the existence of a family unit.

Perhaps chief among these other purposes was a desire to avoid extinguishing the male line of a family by facilitating the death in action of the only surviving son. See S. Rep. No. 1119, *supra;* Hearings before the Senate Committee on Armed Services on H. R. 2664, 88th Cong., 1st Sess., 30–31 (1963); 110 Cong. Rec. 15218 (1964) (remarks of Senator Keating). Other purposes mentioned were providing financial support for the remaining family members, fairness to the registrant who has lost his father in the service of his country, and the feeling that there is, under normal circumstances, a limit to the sacrifice that one family must make in the service of the country. See Hearings before the Senate Committee on Armed Services on H. R. 2664, *supra,* at 30–31; Hearings before Subcommittee No. 1 of the House Committee on Armed Services on H. R. 2664, *supra,* at 3442–3443; 109 Cong. Rec. 24889 (1963).

Perhaps the most that can be said in these circumstances is that Congress had multiple purposes in mind in providing an exemption for a sole surviving son. Depriving petitioner of an exemption might not frustrate one of these purposes, but it certainly would frustrate several of

the others. Therefore, given the beneficent basis for § 6 (*o*), we cannot believe that Congress intended to make one factor, the existence of a "family unit," crucial. Accordingly, the death of petitioner's mother did not operate to deprive him of his right to be exempt from military service. The local board erred in classifying petitioner I–A and ordering him to report for induction.

III.

The Government maintains, however, that petitioner cannot raise the invalidity of his I–A classification and subsequent induction order as a defense to a criminal prosecution for refusal to report for induction. According to the Government, petitioner's failure to appeal his reclassification after the death of his mother constitutes a failure to exhaust available administrative remedies and therefore should bar all judicial review. For the reasons set out below, we cannot agree.

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. See generally 3 K. Davis, Administrative Law § 20.01 *et seq.* (1958 Supp. 1965); L. Jaffe, Judicial Control of Administrative Action 424–458 (1965). The doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938). The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions.[9] Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.

Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute

[9] See, *e. g.*, Layton & Fine, The Draft and Exhaustion of Administrative Remedies, 56 Geo. L. J. 315, 322–331 (1967).

provides that certain administrative procedures shall be exclusive. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) (National Labor Relations Act). The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.

Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." [10] This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.

[10] L. Jaffe, Judicial Control of Administrative Action 425 (1965).

Some of these reasons apply equally to cases like the present one, where the administrative process is at an end and a party seeks judicial review of a decision that was not appealed through the administrative process. Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

In Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created. At the heart of the Selective Service System are the local boards, which are charged in the first instance with registering and classifying those subject to the Selective Service laws. 32 CFR § 1613.1 *et seq.*, §§ 1621.1–1623.10 (1969). Upon being classified by the local board, the registrant has a right of appeal to a state appeal board, 32 CFR § 1626.2 (1969), and, in some instances, to the President, 32 CFR § 1627.3 (1969). No registrant is required to appeal.[11]

[11] The Notice of Classification form, SSS Form 110, informs the registrant of his right to appeal, but does not inform him that failure to appeal may bar a subsequent challenge to the validity of his classification.

A registrant cannot be ordered to report for induction while his classification is being considered by the local board or by an appeal board. 32 CFR §§ 1624.3, 1625.14, 1626.41, 1627.8 (1969).

At some stage during this process, normally shortly before he is expected to be ordered to report for induction, see 32 CFR § 1628.11 (1969), the registrant is required to complete a preinduction physical examination. If he passes this examination, he ordinarily will be ordered to report for induction. The next, and last, step is to report to the induction center and submit to induction. At this point, the administrative process is at an end.

If the registrant fails to report for induction, he is, like petitioner in the present case, subject to criminal prosecution. Although the Universal Military Training and Service Act, as it stood at the time of petitioner's trial, provided that the decisions of the local boards were "final," it was long ago established that a registrant charged with failure to report can raise the defense that there was "no basis in fact" for his classification. See *Estep* v. *United States*, 327 U. S. 114, 123 (1946). It is also established that there can be no judicial review at all, with some exceptions, until the registrant has refused to submit to induction and is prosecuted, or else has submitted to induction and seeks release by habeas corpus.[12]

This case raises a different question. We are not here faced with a premature resort to the courts—all admin-

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[12] These judicially created doctrines were recently enacted as § 10 (b) (3) of the Military Selective Service Act of 1967, 81 Stat. 104. Section 10 (b) (3) provides in pertinent part:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . . . *Provided*, That such review shall go to the ques-

istrative remedies are now closed to petitioner. We are asked instead to hold that petitioner's failure to utilize a particular administrative process—an appeal—bars him from defending a criminal prosecution on grounds which could have been raised on that appeal. We cannot agree that application of the exhaustion doctrine would be proper in the circumstances of the present case.

First of all, it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. This deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts, but when the government is attempting to impose criminal sanctions on him. Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review.[13] The statute as it stood when petitioner was reclassified said nothing which would require registrants to raise all their claims before the appeal boards.[14] We must ask, then, whether there is in

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tion of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 U. S. C. App. § 460 (b)(3) (Supp. III 1968).

We have recently had occasion to interpret this section in the context of preinduction challenges to classifications. See *Clark v. Gabriel*, 393 U. S. 256 (1968); *Oestereich* v. *Selective Service Board*, 393 U. S. 233 (1968). We have granted certiorari in *Breen* v. *Selective Service Board*, No. 1144, cert. granted, April 28, 1969, to consider the applicability of § 10 (b)(3) to preinduction challenges to allegedly "punitive" reclassifications.

[13] See *Yakus* v. *United States*, 321 U. S. 414 (1944).

[14] The 1967 amendment, see n. 12, *supra*, makes no reference to exhaustion of administrative remedies as a prerequisite to challenging the validity of a classification as a defense to a criminal prosecution for refusal to submit to induction. The legislative history of that

this case a governmental interest compelling enough to outweigh the severe burden placed on petitioner. Even if there is no such compelling interest when petitioner's case is viewed in isolation, we must also ask whether allowing all similarly situated registrants to by-pass administrative appeal procedures would seriously impair the Selective Service System's ability to perform its functions.

The question of whether petitioner is entitled to exemption as a sole surviving son is, as we have seen, solely one of statutory interpretation. The resolution of that issue does not require any particular expertise on the part of the appeal board; the proper interpretation is certainly not a matter of discretion.[15] In this sense, the issue is different from many Selective Service classification questions which do involve expertise or the exercise of discretion, both by the local boards and the appeal boards.[16] Petitioner's failure to take his claim through

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amendment indicates that Congress was concerned with certain judicial decisions allowing preinduction review of selective service classifications and the possibility that such "litigious interruption" might seriously affect the administration of the Selective Service System. See *Oestereich* v. *Selective Service Board*, 393 U. S. 233, 245–252 (1968) (dissenting opinion).

[15] Of course, it is necessary that the local board, which has the responsibility of classifying registrants in the first instance, be given the information necessary to perform its function. However, the present case does not present an instance where a registrant is trying to challenge a classification on the basis of facts not presented to the local board. In such a case, the smooth functioning of the system may well require that challenges to classifications based upon facts not properly presented to the board be barred. In the case before us, the board was aware of the relevant facts when it made its decision to reclassify petitioner I–A; no further factual inquiry would have been at all useful.

[16] Conscientious objector claims, Military Selective Service Act of 1967, § 6 (j), 81 Stat. 104, 50 U. S. C. App. § 456 (j) (Supp. III, 1968), or deferments for those engaged in activities deemed "necessary to the maintenance of the national health, safety, or interest,"

all available administrative appeals only deprived the Selective Service System of the opportunity of having its appellate boards resolve a question of statutory interpretation. Since judicial review would not be significantly aided by an additional administrative decision of this sort, we cannot see any compelling reason why petitioner's failure to appeal should bar his only defense to a criminal prosecution.[17] There is simply no overwhelming need for the court to have the agency finally resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution.[18]

We are thus left with the Government's argument that failure to require exhaustion in the present case will induce registrants to by-pass available administrative remedies. The Government fears an increase in litigation and a consequent danger of thwarting the primary function of the Selective Service System, the rapid mobiliza-

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id., § 6 (h) (2), 81 Stat. 102, 50 U. S. C. App. § 456 (h) (2) (Supp. III, 1968), would appear to be examples of questions requiring the application of expertise or the exercise of discretion. In such cases, the Selective Service System and the courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew. 32 CFR § 1626.26. The Selective Service System is empowered by Congress to make such discretionary determinations and only the local and appeal board have the necessary expertise. See *Thompson* v. *United States*, 380 F. 2d 86 (C. A. 10th Cir. 1967).

[17] As noted above, the Selective Service System is not without power to correct its own errors without the intervention of the registrant. See nn. 4 and 5, *supra*.

[18] It is true that we recently made specific reference to the exhaustion doctrine in *Oestereich* v. *Selective Service Board*, 393 U. S. 233, 235–236, n. 5 (1968), a case where all administrative appeals had been exhausted. However, that case involved an attempt to challenge the validity of a classification before receipt of a notice of induction. A registrant's failure to appeal may have different implications if raised in a suit for preinduction review.

tion of manpower. This argument is based upon the proposition that the Selective Service System will, through its own processes, correct most errors and thus avoid much litigation. The exhaustion doctrine is assertedly necessary to compel resort to these processes. The Government also speculates that many more registrants will risk criminal prosecution if their claims need not carry into court the stigma of denial not only by their local boards, but also by at least one appeal board.

We do not, however, take such a dire view of the likely consequences of today's decision. At the outset, we doubt whether many registrants will be foolhardy enough to deny the Selective Service System the opportunity to correct its own errors by taking their chances with a criminal prosecution and a possibility of five years in jail. The very presence of the criminal sanction is sufficient to ensure that the great majority of registrants will exhaust all administrative remedies before deciding whether or not to continue the challenge to their classifications. And, today's holding does not apply to every registrant who fails to take advantage of the administrative remedies provided by the Selective Service System. For, as we have said, many classifications require exercise of discretion or application of expertise; in these cases, it may be proper to require a registrant to carry his case through the administrative process before he comes into court. Moreover, we are not convinced that many in this rather small class of registrants will by-pass the Selective Service System with the thought that their ultimate chances of success in the courts are enhanced thereby. In short, we simply do not think that the exhaustion doctrine contributes significantly to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction. Accordingly, in the present case, where there appears no significant interest to be served in having the

system decide the issue before it reaches the courts, we do not believe that petitioner's failure to appeal his classification should foreclose all judicial review.

We do not view the cases of *Falbo* v. *United States*, 320 U. S. 549 (1944), and *Estep* v. *United States*, 327 U. S. 114 (1946), insofar as they concern the exhaustion doctrine, as a bar to today's holding. Neither those two cases, nor any of the other cases decided by this Court,[19] stand for the proposition that the exhaustion doctrine must be applied blindly in every case. Indeed, those cases all involved ministerial or conscientious objector claims, claims that may well have to be pursued through the administrative procedures provided by the Selective Service laws.[20]

IV.

Finally, we are faced with the argument that petitioner's challenge to the validity of his classification is barred by his failure to report for and pass his pre-induction physical, thus giving the system one last chance to reject him. The Government points to the fact that large numbers of registrants are rejected for physical and mental reasons, and asserts that many criminal trials would be rendered unnecessary if registrants were required to report for a physical before being allowed to challenge their classifications.

We think there are several answers to this argument. First, as we said above, we doubt very much whether very many registrants would pass up the chance to escape service by reason of physical or mental defects and leap immediately at the chance to defend a criminal prosecu-

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[19] See *Billings* v. *Truesdell*, 321 U. S. 542, 558 (1944); *Gibson* v. *United States*, 329 U. S. 338, 349–350 (1946); *Sunal* v. *Large*, 332 U. S. 174, 176 (1947); *Cox* v. *United States*, 332 U. S. 442, 445, 448 (1947).

[20] See n. 16, *supra*.

tion. But more importantly, a registrant is under a duty to comply with the order to report for a physical examination [21] and may be criminally prosecuted for failure to comply.[22] If the Government deems it important enough to the smooth functioning of the system to have unfit registrants weeded out at the earliest possible moment, it can enforce the duty to report for preinduction examinations by criminal sanctions. In the present case, it has not chosen to do so. Petitioner has not been prosecuted for failure to report for his examination; he has been prosecuted for failure to report for induction, a duty he claims he did not have. Therefore, we hold that petitioner's failure to report for his examination should not bar him from challenging the validity of his classification as a defense to his criminal prosecution.

We do not regard *Falbo* v. *United States, supra,* as a bar to this holding. *Falbo* involved an attempt to raise the invalidity of a registrant's classification as a defense to a criminal prosecution for failure to report to a civilian work camp. The Court noted that the defendant had not reported to the work camp and thus had not given the Selective Service System the opportunity to reject him for physical or mental reasons. According to the Court, the "narrow question . . . presented . . . [was] whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." 320 U. S., at 554. The Court held that Congress had not authorized such review.

Falbo was limited by *Estep* v. *United States, supra,* which held that a registrant could secure limited judicial review of his classification in a criminal prosecution for failure to report if he had pursued his administrative

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[21] See 32 CFR §§ 1628.10, 1628.11 (1969).

[22] See n. 1, *supra.*

remedies to an end. In *Estep*, the registrant had reported, had been accepted for induction, but had refused to be inducted.

The holding of the Court in *Falbo* was based in part on a fear of litigious interruption of the Selective Service System. We have dealt with that problem in other cases. See *Clark* v. *Gabriel*, 393 U. S. 256 (1968); *Oestereich* v. *Selective Service Board*, 393 U. S. 233 (1968). It is not presented here. As noted above, the administrative process in this case is at an end.

Finally, the Court in *Falbo* was concerned with the possibility that a registrant might be rejected for physical or mental reasons, thus making a criminal prosecution unnecessary. But, as we have seen, the Selective Service System has ample means to ensure that the great majority of registrants will report for their preinduction examinations. At the time *Falbo* was decided the regulations provided that the preinduction examination was to be given at the time the registrant responded to the order to report for induction or to the work camp. See *Gibson* v. *United States*, 329 U. S. 338 (1946). Accordingly, the Selective Service System had no way to enforce the duty to report for an examination other than by a prosecution for failure to report for induction. An invalid classification, if allowed to be raised, would have been a complete defense to that prosecution; it would not be a defense today to a prosecution for failure to report for a preinduction examination.

We hold that petitioner's failure to appeal his classification and failure to report for his preinduction physical do not bar a challenge to the validity of his classification as a defense to his criminal prosecution for refusal to submit to induction. We also hold that petitioner was entitled to exemption from military service as a sole surviving son. Accordingly, we reverse the judgment of the court below and remand the case for entry of a judgment of acquittal.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 403.—October Term, 1968.

Jack Frederick McKart, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May 26, 1969.]

Mr. Justice Douglas, concurring.

The principle of *Oestereich* v. *United States*, 393 U. S. 23, should dispose of this case. There a registrant was plainly entitled to a statutory exemption from service because he was a divinity student. Yet he was denied the exemption because, having burned his draft card, he was classified as a "delinquent" by Selective Service. He challenged that action in a civil suit for preinduction review; and we granted relief.

This is not a suit for preinduction review, but a defense tendered in a criminal prosecution. This statutory exemption is as clear as the one in *Oestereich*. The "sole surviving" son of a family whose father had been killed in action is exempt and there can hardly be any argument that petitioner is such a "son" though both his father and mother are dead. He is indeed the last male heir of the line and therefore one who Congress charitably decided should not be exposed to the chance of death in warfare.

If Oestereich could raise his claim to statutory exemption in a civil suit at a preinduction stage, it follows *a fortiori* that petitioner can do so in a criminal prosecution for failure to obey the Act's mandate.

The truth of the matter is that it was the Selective Service Board that acted in a "lawless" manner;* and

*While questions of law are usually routed through the available administrative machinery (see *Udall* v. *Tollman*, 380 U. S. 1, 16),

when the error is so egregious, it would be a travesty of justice to require a registrant—whether or not sophisticated—to pursue the administrative remedies that are designed for quite different categories of cases.

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that principle evolved under regulatory schemes where agencies had general oversight and supervision over companies or other groups of individuals. *See Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 51. Arguably, these Selective Service Boards have no claim to that kind of *expertise*. But assuming that they do, the present "legal" question is too transparent to be dignified in that manner.

SUPREME COURT OF THE UNITED STATES

No. 403.—October Term, 1968.

Jack Frederick McKart, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May 26, 1969.]

Mr. Justice White, concurring in the result.

The Court's opinion, as I understand it, does not dispense with the necessity of presenting an issue under the draft laws to the registrant's local board for consideration in the first instance. Petitioner did exactly this, and by its decision, the Court provides no avenue for totally bypassing the Selective Service System and using the courts as an alternative to the local draft boards. Any decision to the contrary would be inconsistent with the well-established principle that the responsible administrative agency must be given "an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 155 (1946). See generally 3 Davis, Administrative Law Treatise § 20.06 (1958). But presentation of the issue to the agency for consideration in the first instance does not complete the litigant's task under the exhaustion doctrine if he would seek resolution of that same issue in the courts. On the contrary, he must resort to appellate remedies available within the agency, and only after those remedies have been exhausted can he turn to the courts for review. See, *e. g.*, *United States* v. *Sing Tuck*, 194 U. S. 161 (1904); *Chicago, M., St. P. & P. Ry.* v. *Risty*, 276 U. S. 567, 575 (1928).

It is petitioner's failure to exhaust appellate remedies available within the Selective Service System which

presents the obstacle to the challenge of his classification in the courts. And while this facet of the exhaustion doctrine, like its other facets, admits of exceptions when special circumstances so warrant, see, *e. g.*, *Donato* v. *United States*, 302 F. 2d 468 (C. A. 9th Cir. 1962), I cannot agree with the Court's apparent conclusion that petitioner's failure to exhaust appellate remedies within the System can be disregarded on the broader ground that only a question of law is involved. Questions of law have not, in the past, been thought to be immune from exhaustion requirements. See, *e. g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Indeed, this Court has often emphasized that the expertise of the responsible agency is entitled to great deference in matters of statutory construction,[1] see, *e. g.*, *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), thus refuting any contention that questions of law are somehow beyond the expertise of the agency and do not give rise to the considerations which underlie the exhaustion doctrine.

Although I would stop far short of the broad strokes used by the Court in this respect, I do agree that peti-

[1] The fact that the relevant statute is ambiguous or uncertain, *e. g.*, *Logan* v. *Davis*, 233 U. S. 613, 627 (1914), or that the agency's interpretation of a statute comes, while its interrelationship with the other parts of the regulatory scheme is as yet "untried and new," *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U. S. 294, 315 (1933), may accord the agency interpretation of the statute additional significance. And since the construction of the sole surviving son exemption is "essentially a question of first impression," p. 5, *ante*, the importance of exhaustion—or of a failure to exhaust—is, perhaps, accentuated in this case. Any ambiguity in the language and legislative history of the statute, or any question as to the role which § 6 (*o*) must play in the statutory scheme would be well suited to resolution by the Selective Service System in the first instance. Exhaustion of appellate remedies within the System would have afforded that agency full opportunity to apply its expertise to these and other questions, thereby facilitating the disclosure of factors which, although germane, are not highly visible to tribunals less familiar with the regulatory scheme.

tioner's failure to exhaust appellate remedies does not bar review of his classification on the facts of this case. Undoubtedly, Congress could require such exhaustion as a prerequisite to judicial review, see, *e. g.*, *Yakus* v. *United States*, 321 U. S. 414 (1944), but Congress has not chosen to do so.[2] In the absence of any such requirement, I do not think review of petitioner's classification is an impermissible encroachment upon the bailiwick of the Selective Service System. We are not faced with a situation in which consideration of the issue involved has stopped at the first level of the administrative machinery. Rather, petitioner's case and the scope of the § 6 (*o*) exemption for sole surviving sons have received the attention of both the State and the National Director of the Selective Service System. Petitioner has not exhausted the channels for formal appellate review within the System, but the informal review given petitioner's case and the ratification by the State and National Directors of the position taken by petitioner's local board are sufficient justification to permit the courts to entertain petitioner's defense that his classification is improper under § 6 (*a*).

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[2] Compare *Falbo* v. *United States*, 320 U. S. 549 (1944). Section 10 (b)(3) of the Military Selective Service Act of 1967, 81 Stat. 104, prescribes the timing of judicial review—"after the registrant has responded either affirmatively or negatively to an order to report for induction"—but does not speak to the exhaustion question.

It should be noted that where agency orders are not suspended during the pendency of an administrative appeal, Congress has seen fit to permit judicial review without exhaustion of appellate remedies. Administrative Procedure Act § 10 (c), 5 U. S. C. § 704. Under that section, however, if the agency action is inoperative during administrative review, the agency may require exhaustion by its own rules. Since induction may not be ordered during a registrant's appeal, 32 CFR §§ 1626.41, 1627.8 (1969), the Selective Service System could require exhaustion even if subject to § 10 (c) of the APA. The administration of the draft laws, however, is not covered by the APA, and the necessity for exhausting appellate remedies would seem to rest on the general doctrine developed by the courts.